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INDEX

	Page
Opinions below	1
Jurisdiction	1
Statutes and regulations involved	2
Questions presented	2
Statement	3
The questions are substantial	10
Conclusion	21
Appendix A:	
First opinion of the District Court	23
Order of District Court, dated February 24, 1961	34
Second opinion of the District Court	36
Order of District Court, dated March 8, 1962	49
Unprinted opinion of the Supreme Court of Illinois	53
Superseding opinion of the Supreme Court of Illinois	58
Appendix B	66

CITATIONS

Cases:	
Alabama v. *King & Boozer*, 314 U.S. 1	12, 13, 16, 17
Cohon v. *Oscar L. Paris Co.*, 17 Ill. App. 2d 21, 149 N.E. 2d 472	11
Department of Revenue of Illinois v. *United States*, 368 U.S. 30	9
Harrison Sheet Steel Co. v. *Lyons*, 15 Ill. 2d 532, 155 N.E. 2d 595	11
Indian Motorcycle Co. v. *United States*, 283 U.S. 570	16
James v. *Dravo Contracting Co.*, 302 U.S. 134	16
Kern-Limerick, Inc. v. *Scurlock*, 347 U.S. 110	11, 12–13, 14, 15, 17, 21
Laurens F. S. & L. v. *S. C. Tax Comm'n*, 365 U.S. 517	14
Livingston v. *United States*, 364 U.S. 281	2
Mayo v. *United States*, 319 U.S. 441	2
Moses Lake Homes, Inc. v. *Grant County*, 365 U.S. 744	18
Panhandle Oil Co. v. *Knox*, 277 U.S. 218	15, 16

Cases—Continued

	Page
Penn Dairies v. *Milk Control Commission*, 318 U.S. 261	16
People ex rel. Holland Coal Co. v. *Isaacs*, 22 Ill. 2d 477, 176 N.E. 2d 889	5, 8, 19, 20
People ex rel. Holland Coal Co. v. *Isaacs*, unreported opinion of May 10, 1961 (Sup. Ct. Ill.)	8
Phillips Chemical Co. v. *Dumas School Dist.*, 361 U.S. 376	18
Pittman v. *Home Owners Loan Corp.*, 308 U.S. 21	14
Query v. *United States*, 316 U.S. 486	2
Toomer v. *Witsell*, 334 U.S. 385	2
United States v. *City of Detroit*, 355 U.S. 466	17, 18
United States v. *Livingston*, 179 F. Supp. 9, affirmed, 364 U.S. 281	13
Statutes:	
Act of July 31, 1961, II Laws of Illinois (1961), p. 2312:	
Sec. 1	8, 20, 71
Sec. 2	73
Sales Tax or Retailers' Occupation Tax Act, 2 Illinois Revised Statutes (1961), c. 120:	
Sec. 440	4, 11, 66
Sec. 441	4, 5, 8, 20, 68
Sec. 442	4, 69
Use Tax Act, 2 Illinois Revised Statutes (1953), c. 120:	
Sec. 439.1	73
Sec. 439.3	73
Sec. 439.7	5, 76
Sec. 439.8	76
Sec. 439.9	5–6, 77
Sec. 441	4
Miscellaneous:	
Lucas, *Nonproperty Taxes under the Illinois Constitution*, 25 Univ. of Chicago L. Rev. 63	11
Rules and Regulations under Illinois Retailers' Occupation Tax Act (January, 1962, ed.), Illinois Department of Revenue:	
Art. No. 1	6, 77
Rule No. 16	7, 78
Rule No. 40	7, 79
Rules and Regulations under Illinois Use Tax Act (January, 1962, ed.), Illinois Department of Revenue, Rule No. 3	6, 80

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. —

UNITED STATES OF AMERICA AND OLIN MATHIESON CHEMICAL CORPORATION, APPELLANTS

v.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS AND THEODORE J. ISAACS, DIRECTOR OF REVENUE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The majority and dissenting opinions of the district court (App. A, *infra*, pp. 36–48) are reported at 202 F. Supp. 757. The earlier opinion of the district court (App. A, *infra*, pp. 23–34) is reported at 191 F. Supp. 723.

JURISDICTION

This suit was brought under 28 U.S.C. 1331, 1332, and 1345, before a three-judge court convened under 28 U.S.C. 2281 and 2284, to enjoin as unconstitutional, the enforcement of the Illinois Retailers' Occu-

pation Tax, as applied to sales of tangible personal property made directly to the United States.

The order of the district court was entered on March 8, 1962 (App. A, *infra*, pp. 49–52), and the notice of appeal was filed on May 7, 1962. The jurisdiction of this Court to review the judgment on direct appeal is conferred by 28 U.S.C. 1253 and 2101. *Livingston* v. *United States*, 364 U.S. 281; *Toomer* v. *Witsell*, 334 U.S. 385; *Mayo* v. *United States*, 319 U.S. 441; and *Query* v. *United States*, 316 U.S. 486.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Illinois statutes and rules and regulations promulgated by the Illinois Department of Revenue are set forth in Appendix B, *infra*, pp. 66–81.

QUESTIONS PRESENTED

Whether, as applied to sales made to the United States, the Illinois Retailers' Occupation Tax Act is unconstitutional because—

1. it violates the immunity which the United States has from state taxation by imposing a tax upon sales made to the United States; and
2. it discriminates against the United States and those with whom it deals in that
   a. it provides (in conjunction with the related Use Tax Act) that purchasers other than the United States will themselves pay the tax, whereas the seller must pay the tax on sales to the United States, and
   b. it exempts from the tax sales to charitable, religious and educational institutions.

STATEMENT

This action was instituted in the district court by the United States and the Olin Mathieson Chemical Corporation ("Olin Mathieson") to enjoin the enforcement of the Illinois Retailers' Occupation Tax Act in its application to sales made by Olin Mathieson and others to the United States. The complaint alleged that, as applied to such sales, the Illinois Act was unconstitutional because it (1) violated the constitutional immunity of the United States from State taxation and (2) unlawfully discriminated against the United States and its sellers.

According to the complaint, Olin Mathieson, during a three-month period in 1957, manufactured, sold and delivered in Illinois to the United States Air Force aircraft engine starter cartridges required by the United States for national defense. The total sales price of the cartridges was $901,204, and the total tax thereon was $27,036. Pursuant to instructions given by the United States to Olin Mathieson, the latter has refused to pay the tax. The complaint also alleged that several hundred other firms sell tangible property at retail in Illinois to the United States that is required for national defense and other governmental purposes; and that, under its existing sales contracts, the United States is obligated to reimburse Olin Mathieson and other sellers for any taxes they may be required to pay under the Illinois Act. (App. A, *infra*, pp. 23–24.)

The district court initially held that the statute illegally discriminated against the United States, and

enjoined its enforcement. On appeal by the State of Illinois, this Court vacated the judgment and remanded for reconsideration in the light of intervening developments. In its second decision, from which this appeal is taken, the district court rejected the government's attacks on the statute and held it constitutional.

1. *The Illinois System of Sales and Use Taxes.*

Illinois has a sales or retailers' occupation tax and a closely interrelated use tax. The Retailers' Occupation Tax Act (2 Ill. Rev. Stat. (1961), c. 120, Sec. 440, *et seq.*, App. B, *infra*, pp. 66–73) imposes a tax upon persons engaged in the business of selling tangible personal property at retail of 3½ percent of the gross receipts of such sales.[1] During the period August 1, 1953, to July 31, 1961, the statute made the tax inapplicable to (1) "the proceeds of such sales to the State of Illinois, any county, political subdivision or municipality thereof, or to any instrumentality or institution of any of the governmental units aforesaid; and * * * [2] the proceeds of such sales to any corporation, society, association, foundation, or institution organized and operated exclusively for charitable, religious or educational purposes" Illinois Revised Statutes (1953), c. 120, Section 441. The Act was amended effective August 1, 1961, to eliminate the exemption for the State and its political subdivisions; the exemption for charitable, educational and religious institutions was continued. The

[1] On sales made prior to July 1, 1959, and after June 30, 1963, the tax rate is 2½ percent.

tax is not applicable to businesses in interstate commerce which "may not, under the constitution and statutes of the United States, be made the subject of taxation by this State" (Section 441). The Illinois Supreme Court has described the practice followed by sellers in collecting this tax as follows:

> It is the common and accepted practice of persons subject to the retailers' occupation tax to quote and collect the tax separately from the selling price. In such circumstances the burden of the tax is shifted forward to the purchaser. [*People ex rel. Holland Coal Co. v. Isaacs*, 22 Ill. 2d 477, 480–481, 176 N.E. 2d 889, 891.]

The Illinois use tax, established in 1955, is imposed upon the use within the State of tangible personal property purchased at retail within or without the State. The rate is the same as the occupation tax, and there is the same exemption for sales to charitable, religious or educational institutions. The tax is collected from the purchaser by the retailer, and the Act makes it a misdemeanor for any retailer "to advertise or hold out or state to the public or to any purchaser, consumer or user, directly or indirectly, that the tax or any part thereof * * * will be assumed or absorbed by the retailer or that it will not be added to the selling price of the property sold * * *" (Section 439.7, App. B, *infra*, p. 76). However,

> A retailer need not remit that part of any [use] tax collected by him to the extent that he is required to remit and does remit the tax imposed by the Retailers' Occupation Tax Act.

with respect to the sale of the same property. [Section 439.9, App. B, *infra*, p. 77.]

The Rules of the Illinois Department of Revenue under the Retailers' Occupation Tax Act (Article No. 1, App. B, *infra*, pp. 77–78) state:

> [W]ith the enactment of the Use Tax Act in 1955, the retailer became a tax collector under that Act and is required to comply with the bracket systems or tax collection schedules prescribed in the Department's use tax Rules and Regulations for the collection of the use tax by retailers from users. There no longer is any occasion for the retailer to shift the burden of the retailers' occupation tax since he will reimburse himself for his retailers' occupation tax liability by collecting the use tax from his customers, except in rare situations in which the retailers' occupation tax would apply but the use tax would not apply (such as in the case of sales to foreign governments).

Rule 3 under the Use Tax Act (App. B, *infra*, pp. 80–81) provides:

> Since the State cannot place the legal burden of a tax directly on the United States Government or a foreign government, such governments are not required to remit the use tax directly to this State, nor can such governments be compelled to reimburse retailers for the use tax.
>
> However, for information concerning the status of retailers under the Retailers' Occupation Tax Act, when making sales to the United States Government, its agencies or instrumentalities, see Rules 16 and 40 of the retailers' occupation tax Rules and Regulations.

Rule 16, par. 1, and Rule 40, par. 1, of the Retailers' Occupation Tax Act Rules and Regulations, provide that persons engaged in the business of selling tangible personal property incur occupation tax liability when selling any such property to the United States (App. B, *infra*, pp. 78–80).

2. *The Proceedings in the District Court.*

a. *The first decision and the subsequent State judicial and legislative developments.* (1) The original complaint, filed in August 1960, challenged the constitutionality of the Illinois tax, as applied to the sales made by Olin Mathieson and others in Illinois to the United States, on two grounds: (1) It impinged on the federal government's constitutional immunity from State taxation and (2) it discriminated against the United States because it excluded from taxation sales made to the State of Illinois and its political subdivisions. A three-judge district court was convened. The defendants—the State of Illinois and its Director of Revenue—moved to dismiss on jurisdictional grounds, and for failure to state a cause of action. On February 24, 1961, the district court ruled that it had jurisdiction of the action, held that the Act, as applied, was unconstitutional because it discriminated against the United States in favor of the State and charitable, religious and educational institutions, and enjoined its enforcement. The defendants took an appeal to this Court.

(2) In May 1961, the Supreme Court of Illinois held that the statute was unconstitutional to the extent that it exempted from the tax the State and its politi-

cal subdivisions and charitable, educational and religious institutions (*People ex rel. Holland Coal Co. v. Isaacs,* unreported opinion of May 10, 1961, reprinted in App. A, *infra,* pp. 53–58). In July 1961, the Illinois legislature amended Section 441 of the Occupation Tax Act, effective August 1, 1961, to eliminate the exemption for the State and its political subdivisions. It retained the exemption for sales to charitable, educational and religious institutions. The amending act declared that the latter exemption was in the public interest and was a public policy of the State "unless the creation of such an exemption will automatically, and contrary to the intent of this Act, exempt from the measure of the Retailers' Occupation Tax Act the proceeds of sales to the United States Government, its agencies and instrumentalities and contractors with that Government" (Act of July 31, 1961, II Laws of Illinois (1961), p. 2313, Sec. 1 (App. B, *infra,* pp. 71–73)).

On September 22, 1961, the Illinois Supreme Court issued a superseding opinion in the *Holland Coal* case, *supra.* 22 Ill. 2d 477, 176 N.E. 2d 889 (App. A, *infra,* pp. 58–65). In that opinion, it adhered to its prior ruling that the statutory exemption for the State and its instrumentalities was unconstitutional, but reversed its prior conclusion that the exemption for charitable, educational and religious institutions was invalid.

(3) Following the docketing in this Court of the appeal from the district court decision and the filing of a memorandum in which the present appellants suggested that, in light of the first decision in the *Holland*

Coal case and the amendment of the statute, the case should be remanded for further consideration, this Court on November 6, 1961, vacated the judgment and remanded to the district court "for further consideration in light of developments which have occurred since the injunction was issued * * *." *Department of Revenue of Illinois v. United States*, 368 U.S. 30.

b. *The second decision.* After the remand by this Court, the plaintiffs filed a second amended complaint which retained the allegation that the tax violated the federal government's constitutional immunity from State taxation, and added the allegation that the tax unlawfully discriminated against the United States in favor of charitable, educational and religious institutions. On March 8, 1962, the district court held that the amended Act is constitutional (App. A, *infra*, pp. 36-43). The court reversed its prior ruling that the exemption for sales to charitable, religious and educational institutions unlawfully discriminated against the United States. It held that this exemption reflects "an old and well established public policy," encourages the existence of such institutions, and "relieves the State of the heavy burden of maintaining and performing these essential services"; that, although the objectives of these institutions might be performed by the government and financed through the taxing power, their performance by non-governmental organizations depends upon finances "derived from the concept of giving voluntarily"; and that "[t]his difference forms a reasonable basis for a separate classification and the exemption, therefore, does not discriminate against governmental bodies."

The court also rejected the appellants' contention that the tax infringed the government's sovereign immunity from state taxation.

District Judge Robson, dissenting, was of the view that the tax is unconstitutional in two respects. First, the exemption in favor of charitable, religious and educational institutions violates the "fundamental principle of law proscrib[ing] discrimination in the treatment of the Federal Government in the imposition of taxes." (App. A, *infra*, p. 44). Second, since "the tax, in legal incidence as well as practical operation, falls on the vendee—the United States," "it is in violation of the sovereign immunity of the United States" (*id.*, pp. 47, 46).[2]

THE QUESTIONS ARE SUBSTANTIAL

This appeal presents the substantial question whether a State may collect from one who sells directly to the United States that portion of a Retailers' Occupation Tax measured by gross sales which is attributable to the sales directly to the United States where, in all other cases, the tax is required to be

[2] Although the court denied the plaintiffs' motion for a permanent injunction, it enjoined the defendants from making or enforcing any assessments or collections under the Act against Olin Mathieson or others with respect to sales made to the United States or its agencies prior to August 1, 1961, or during any period when the taxes provided by the Act were not assessed or collected with respect to proceeds of sales to the State of Illinois. The court also temporarily enjoined the collection of any tax under the amended Act with respect to sales made to the United States until the plaintiffs' time to appeal to this Court had expired and, if such an appeal were timely filed, until it was determined.

collected from the purchaser. We submit that the collection of the tax is unconstitutional for two reasons: (1) The tax is upon purchases of the United States; consequently the tax is unconstitutional under *Kern-Limerick Inc.* v. *Scurlock*, 347 U.S. 110. (2) If the tax be exclusively upon the seller's business and not upon the transaction with the United States, the statute discriminates against sellers doing business with the United States and is therefore unconstitutional. Since the Illinois Occupation Tax, despite its name, is an ordinary sales tax in both its legal intendment and practical effect,[3] the question presented

[3] Although the Illinois tax is generally designated as a Retailers' Occupation Tax (but see App. B, *infra*, p. 66, where the tax is captioned in the Illinois Revised Statutes as the "Sales Tax or Retailers' Occupation Tax Act"), this terminology apparently results from peculiarities of the Illinois Constitution. Lucas, *Nonproperty Taxes under the Illinois Constitution*, 25 U. of Chi. L. Rev. 63, 66–67, 99–107. In actual operation and effect, the tax is an ordinary sales tax, rather than a tax upon the privilege of engaging in retail business or a gross receipts tax. Thus, the seller by custom, and by law under the Use Tax Act, passes the tax on to the purchaser. The tax is not applicable to sales to charitable, religious or educational institutions—categories which are usually exempt from typical sales taxes. The "gross receipts" to which the tax is to be applied are defined in terms of the "selling price," and the latter in turn is defined in sales-tax terms (Section 440, App. B, *infra*, pp. 66–68). It is a misdemeanor for a retailer to tell the public or a purchaser that it will absorb the tax. When the purchaser pays to the seller a tax which it subsequently turns out was not payable, he may recover it. *Harrison Sheet Steel Co.* v. *Lyons*, 15 Ill. 2d 532, 155 N.E. 2d 595; *Cohon* v. *Oscar L. Paris Co.*, 17 Ill. App. 2d 21, 149 N.E. 2d 472.

[4] See note 3, *supra*.

affects vast federal procurement programs and State revenues in many States.

1. In *Kern-Limerick, Inc.* v. *Scurlock, supra,* this Court held that an Arkansas sales tax, similar to this Illinois tax in its significant legal and operational effect, could not constitutionally be applied to sales to the federal government because the government's sovereign immunity had not been waived. The Arkansas law imposed an excise tax of two percent upon the gross receipts of all sales; the tax was to be paid to the State by the seller who, in turn, was required to collect it from the purchaser. The tax was "a sales tax, not a use tax" (347 U.S. at 111). Arkansas attempted to collect the tax upon a sale of tractors to be used in constructing a naval depot for the United States under a cost-plus-fixed-fee contract. Arkansas asserted that the sale was to the contractor and was therefore taxable regardless of the incidence of the ultimate economic burden. Cf. *Alabama* v. *King & Boozer,* 314 U.S. 1. The United States and the contractor replied that the purchaser under this contract was the United States. This Court, agreeing that the United States was the purchaser, pointed out that its decisions "consistently prohibit taxes levied on the property or purchases of the Government itself" (347 U.S. at 123), and held that the application of the tax to the sale to the United States violated its constitutional immunity from State taxation.

The decision in *Kern-Limerick* thus rests upon the fundamental premise that a State may not constitutionally tax the purchases of the United States. The

division in the Court was upon the question whether, under the provisions of the federal procurement contract there involved, the United States or the contractor was the real purchaser of the property. Once the majority concluded that the United States was the purchaser, it followed that the tax was invalid, since the Constitution prohibits State "taxes levied on the * * * purchases of the Government itself" (347 U.S. at 123). The dissenting justices did not question the latter proposition. That principle is also entirely consistent with *Alabama* v. *King & Boozer*, 314 U.S. 1, where the Court sustained the application of the Alabama Sales Tax, "with which the seller is chargeable, but which he is required to collect from the buyer" (pp. 6–7), to lumber sold to contractors for use in building an army camp for the United States. The ground of decision was that, under the particular government contract there involved, the contractor, and not the federal government, was the purchaser of the property. In both cases the Court recognized—explicitly in *Kern-Limerick* and implicitly in *King & Boozer*—that a State cannot impose a sales or gross receipts tax upon the sale of property to the United States. See, also, *United States* v. *Livingston*, 179 F. Supp. 9 (E.D.S.C.), affirmed, 364 U.S. 281.

Under this analysis it makes no difference whether the State attempts to tax the purchases of the federal government directly by taxing the United States, or indirectly through a sales or other excise tax upon the transaction by which the United States acquires property. For the teaching of *Kern-Limerick* is that

the constitution prohibits the States from taxing the "purchases of the government itself," and the method by which the tax is collected is immaterial. Cf. *Pittman* v. *Home Owners' Loan Corporation*, 308 U.S. 21, 31; *Laurens F. S. & L.* v. *South Carolina Tax Commission*, 365 U.S. 517.

The application of the Illinois Retailers' Occupation Tax and the related use tax to sales made by Olin Mathieson and others to the United States are invalid because they, too, involve an attempt by the State to tax "purchases of the government itself." The Illinois Tax, both in form and actual operation, is strikingly similar to the Arkansas tax involved in *Kern-Limerick*. Both taxes are measured by a percentage of the seller's gross. Both are required to be paid to the State by the seller. Under both, the seller collects the tax from the purchaser—under Arkansas law, by a specific statutory requirement; under Illinois law by "common and accepted practice" under the Retailers' Occupation Tax law, and by specific requirement of the interrelated use tax law (see the Statement, *supra*, pp. 4–6). Both provide that the tax is not applicable to the gross receipts from sales to the United States—the Arkansas tax by the terms of the statute (see *Kern-Limerick*, 347 U.S. at 112), the Illinois tax by the rules of the State Department of Revenue (see the Statement, *supra*, p. 6). The same reasoning which led this Court to hold that the Arkansas tax was invalid as applied to the sales to the United States involved in *Kern-Limerick* also compels the conclusion that the

Illinois tax is invalid as applied to the sales to the United States involved in the present case.

The court below distinguished *Kern-Limerick Inc. v. Scurlock* upon the ground that the Illinois statute, unlike the Arkansas law, does not expressly require the collection of the tax from the purchaser and therefore its legal incidence is upon the seller, not upon the United States. We acknowledge that some support for this view may be found in the history of *Panhandle Oil Co.* v. *Knox*, 277 U.S. 218. In the *Panhandle* case this Court, in holding that the application of a Mississippi excise tax of three or four cents a gallon upon sales of gasoline made to the United States constituted an unconstitutional interference by the State with federal functions, stated (pp. 221–222) that the State "may not lay any tax upon transactions by which the United States secures the things desired for its governmental purposes"; and that "[i]t is immaterial that the seller and not the purchaser is required to report and make payment to the State," since

> Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests * * *. To use the number of gallons sold to the United States as a measure of the privilege tax is in substance and legal effect to tax the sale. * * * And that is to tax the United States—to exact tribute on its transactions and apply the same to the support of the State.

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In *James* v. *Dravo Contracting Co.*, 302 U.S. 134, which upheld the application of a State gross receipts tax to the amounts received by a contractor for construction done for the United States, the Court described *Panhandle* as having invalidated "a state tax on a sale to the United States"; the Court further stated that *Panhandle* and a related case[5] "have been distinguished and must be deemed to be limited to their particular facts" (302 U.S. at 151). In *Alabama* v. *King & Boozer*, 314 U.S. 1, the Court stated (p. 9) that the "asserted right" of the federal government "to be free of taxation by the [State] does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the [Federal] Government and who have been granted no tax immunity. So far as a different view has prevailed, see *Panhandle Oil Co.* v. *Knox*, *supra* * * *, we think it no longer tenable." See, also, *Penn Dairies* v. *Milk Control Commission*, 318 U.S. 261, 277, where the Court stated that *Panhandle* "and like cases * * * were overruled" in *King & Boozer*, *supra*.

These cases can be read as pointing to the conclusion that sovereign immunity is not violated unless the State tax is levied upon the United States and the United States is required to pay it as a matter of law, either directly or through a collection agent such as a retailer required to collect a sales tax from

[5] *Indian Motorcycle Co.* v. *United States*, 283 U.S. 570, in which "a federal tax on the sale to a municipal corporation of Massachusetts" (*James*, *supra*, p. 151) was invalidated.

a purchaser. *Kern-Limerick Inc.* v. *Scurlock* is not necessarily inconsistent with this conclusion. In our view, however, the cases leading up to, and including, *Alabama* v. *King & Boozer* do not go so far. They establish no more than that "the Government's constitutional immunity does not shield private parties with whom it does business from state taxes imposed on them merely because part or all of the financial burden of the tax eventually falls on the Government" (*United States* v. *City of Detroit,* 355 U.S. 466, 469).

In the present case the tax itself is levied upon a transaction with the United States; although denominated a Retailers' Occupation Tax, the tax not only operates as a sales tax but is dependent in exact ratio to the dollar volume of each individual sale. It is tied in with a use tax. The plain intendment of the legislation is that a tax be levied upon each transaction and that it be paid by the purchaser. To distinguish between this tax upon sales to the United States and a sales tax paid by the United States goes beyond holding that the federal government cannot complain merely of the ultimate economic burden and converts the immunity into a mere form of words.

In the present state of the precedents it seems obviously important to the proper administration of both federal and State fiscal programs that this Court should definitively settle the scope of the "immunity of Government in relation to its purchases of commodities" (*Kern-Limerick, supra,* p. 118). Thus, even if, contrary to our belief, *Kern-Limerick* did not decide that a tax like the Illinois Retailers' Occupation Tax may not constitutionally be applied to sales to the

federal government, the question plainly is an important one which this Court should resolve.

2. Assuming that the Illinois tax does not violate the sovereign immunity of the United States because its incidence, in the case of sales to the United States, is only upon the seller, then the tax violates the settled principle that "a state tax may not discriminate against the Government or those with whom it deals." *Phillips Chemical Co.* v. *Dumas School District*, 361 U.S. 376, 387; see also *United States* v. *City of Detroit*, 355 U.S. 466, 473; *Moses Lake Homes, Inc.* v. *Grant County*, 365 U.S. 744, 751.

(a) The unconstitutional discrimination results from the fact that the Illinois tax laws provide generally for a tax upon sales which will be paid by the purchaser whereas in the case of sales to the United States they provide (under the foregoing assumption) for a tax upon the seller himself. As explained in the Statement (pp. 4–7, *supra*), the Illinois Retailers' Occupation Tax and the Use Tax are closely interrelated. In the case of sales to the United States, however, the State has provided by regulation (Statement, *supra*, p. 6) that "[s]ince the State cannot place the legal burden of a tax directly on the United States Government or a foreign government, such governments are not required to remit the use tax directly to this State, nor can such governments be compelled to reimburse retailers for the use tax." The regulation further provides that the seller is liable for the occupation tax on sales made to the United States, even though he cannot require the latter to reimburse him therefor. In all other cases the retailer is first nom-

inally subjected to the occupation tax imposed upon, and measured by, dollar sales, but the seller is also required to collect from all purchasers other than the United States a use tax which is identical in amount to the aliquot portion of the occupation tax (*i.e.*, it equals the occupation tax attributable to those sales). The seller is not required to remit that amount to the State if he has paid the occupation tax attributable to the sale, and he is prohibited from telling any purchaser that he will absorb the use tax. Disregarding the labels "use tax" and "occupation tax" the net result is that not merely in economic effect but under the mandate of the law the seller collects a tax from non-exempt purchasers which the seller forwards to the State. "The burden of the tax," the Supreme Court of Illinois has said, "is shifted forward to the purchaser" (*People ex rel. Holland Coal Co.* v. *Isaacs*, 22 Ill. 2d 477, 480–481, 176 N.E. 2d 889, 891).

The result is exactly the same as if the State had required sellers to collect a use tax from all buyers except the United States and had then imposed an equivalent occupation tax only upon retailers who should deal with the United States. The hypothetical case would present the plainest example of an unconstitutional discrimination. In the case at bar only the names of the taxes are changed.

(b) The extent of the discrimination against the United States is emphasized by the institutional exemptions. The Retailers' Occupation Tax does not apply to "proceeds of * * * sales to any corporation, society, association, foundation or institution organ-

ized and operated exclusively for charitable, religious or educational purposes" (Sec. 441, App. B, p. 69 *infra*). The same exemption is provided from the use tax. Sec. 439.3, App. B, *infra*, pp. 74–75. Of course a State may constitutionally draw a distinction, for various tax purposes, between sales generally and those to charitable, religious and educational institutions. See *People ex rel. Holland Coal Co.* v. *Isaacs*, 22 Ill. 2d 477, 176 N.E. 2d 889, discussed *supra*, p. 8. But once the State attempts to impose its taxes upon transactions involving the United States, it cannot place the latter in a less favorable position than anyone else who might be subject to the same tax. The Illinois tax violates this principle by providing an exemption for the proceeds of sales to charitable, religious and educational organizations that is not also available for sales to the United States.[6]

[6] In amending the Retailers' Occupation Tax Act in 1961 to eliminate the exemption in favor of the State, the Illinois Legislature declared that the exemption for charitable, religious and educational institutions, which it continued, was in the public interest and was a public policy of the State, "unless the creation of such an exemption will automatically, and contrary to the intent of this Act, exempt from the measure of the Retailers' Occupation Tax Act the proceeds of sales to the United States Government, its agencies and instrumentalities and contractors with that Government" (App. B, *infra*, pp. 72–73). If this Court should hold that exemption for charitable, religious and educational organizations invalidates the statute as applied to sales to the United States, that would not render this aspect of the case moot. For whether or not such a ruling would automatically terminate the exemption, the appellants would still be entitled to relief against the tax for the period of this litigation and until the State of Illinois begins applying it to the proceeds of sales to those institutions.

(c). Our argument that the Illinois tax unconstitutionally discriminates against sellers doing business with the United States may seem somewhat artificial against the background of the knowledge that the State is really trying to impose the same tax upon sales transactions between retailers and the United States—to be paid by the United States—as it imposes upon sales transactions between retailers and the general run of customers who are required to pay the tax in the form of an off-setting use tax. We acknowledge the artificiality if it indeed be accepted that the incidence of the Illinois tax, in both cases, is upon the sale to, and purchase by, the United States. For, in that event, the tax is unconstitutional under *Kern-Limerick Inc.* v. *Scurlock*, as pointed out above.

CONCLUSION

The questions presented by this appeal are substantial and of public importance. Probable jurisdiction should be noted.

Respectfully submitted.

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JULY 1962.

APPENDIX A

First Opinion

In the United States District Court
Northern District of Illinois
Eastern Division

Filed, February 24, 1961

No. 60 C 1365

United States of America and Olin Mathieson Chemical Corporation

v.

Department of Revenue of the State of Illinois and Andrew Fasseas, Director of Revenue

Before Knoch, Circuit Judge, La Buy and Robson, District Judges.

Jurisdiction to hear the above matter is invoked pursuant to §§ 1345, 1331 and 1332 of the Judicial Code, 28 U.S.C.A. The complaint prays that this court declare the provisions of the Illinois Retailers' Occupation Tax Act (Ch. 120, §§ 440 ff., Smith-Hurd Ann. Stats.) unconstitutional, void and of no effect in so far as they permit taxation of receipts from sales of tangible personal property to the United States or the taxation of such sales, and to enjoin the assessment and collection thereof.

Briefly, it is alleged that for a period of three months in 1957 the plaintiff, Olin Mathieson Chemical Corporation, designed, manufactured, sold and delivered in Illinois to the United States Air Force aircraft engine starter cartridges required by the

United States for national defense; that the amount paid by the United States therefor was $901,204.08; that the State of Illinois claims an occupation tax thereon in the sum of $27,036.12, which amount has not been paid because the United States has instructed Olin Mathieson to refuse to pay any part thereof; that several hundred persons and firms in addition to Olin Mathieson are engaged in making sales at retail of tangible personal property in Illinois to the United States which property is and will be required to further the national defense and perform other governmental functions; that the United States has instructed these vendors to refuse to pay taxes on receipts from sales to it.

It is further alleged that under the provisions of existing contracts, the United States is obligated to reimburse Olin Mathieson and other vendors if they should be required to pay any taxes under the Act. The parties have stipulated that in addition to Olin Mathieson there are more than 1440 persons or firms in the State of Illinois engaged in sales to agencies of the Department of Defense, including the United States Air Force, United States Army, United States Navy, and the Military Petroleum Supply Agency; that the total amount of these contracts is in excess of $623,655,000.

The United States contends that the inclusion of such a tax on proceeds from sales to the Federal Government is in violation of the Constitution of the United States because (1) it results in discrimination against the United States and those with whom it deals in that the Illinois Retailers' Occupation tax is not imposed on proceeds from sales made "to the State of Illinois, any county, political subdivision or municipality thereof, or to any instrumentality or institution of any of the governmental units aforesaid. . . ." (§ 441, Ch. 120, Smith-Hurd Ann. Stats.),

and (2) violates the immunity from state and local taxation to which the United States is entitled. It is also stated that there exists no plain, speedy and efficient remedy which plaintiffs may pursue in the courts of Illinois.

Defendants, by motion to dismiss, assail the jurisdiction of this court to entertain this controversy. The reasons therefore are (1) the United States is not a proper party plaintiff for it is not a taxpayer under the Illinois law; (2) § 1341, 28 U.S.C.A., proscribes the jurisdiction of this court to enjoin or otherwise prevent the collection of taxes claimed to be due under state law and said section applies to suits brought by the United States as well as suits brought by others; (3) plaintiffs have a plain, speedy and efficient remedy for contesting the liability for such taxes in the state courts; and (4) the plaintiff, Olin Mathieson, is within the inhibition of the Eleventh Amendment to the Constitution of the United States and cannot bring suit against the State of Illinois.

In the alternative, defendants urge dismissal of the claim on its merits for the reason (1) the Illinois occupation tax applies to all retailers of the class described in the complaint who are engaged in the transactions alleged therein, and therefore these taxes do not discriminate against the sovereignty of the United States; and (2) it fails to state a claim upon which relief can be granted.

In *United States* v. *Livingston* (D.C.S.C., 1959), 179 F. Supp. 9, aff'd per curiam, 364 U.S. 281, reh. den. 364 U.S. 855, the court held that § 1341, 28 U.S.C.A., proscribing federal court jurisdiction in suits to enjoin collection of taxes where a plain, speedy and efficient remedy exists in the state courts is not applicable to the United States. It is implicit in § 1341, as it is in any action brought by the sovereign, that

the interest of the United States must be of the kind to support its presence as a party litigant. *United States* v. *San Jacinto Tin Co.* (1887), 125 U.S. 273, 285; *United States* v. *Beebe* (1887), 127 U.S. 338.

Where a taxpayer is singled out and treated differently from all those similarly situated because he transacts business with the United States, as is alleged here, such action discriminates not only against him but also against the United States. *Pacific Co.* v. *Johnson* (1932), 285 U.S. 480, 493; *United States* v. *Allegheny County* (1943), 322 U.S. 174; *United States* v. *City of Detroit* (1957), 355 U.S. 466, 473; *Phillips Co.* v. *Dumas School Dist.* (1960), 361 U.S. 376. Furthermore, the United States is a proper party plaintiff because it has a substantial pecuniary interest in the outcome of the suit for it is obligated by contract to reimburse the taxpayer.

We conclude that the interest of the United States in this suit is direct and substantial and that it is a proper party litigant. We are further persuaded by the reasoning in the *Livingston* case,* *supra*, that

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* "There appears no good reason why the Congress should deny the United States the protection of the equitable powers of her own courts in a situation such as that with which we are now concerned, and it has been generally and broadly held that it did not do so when it enacted * * * what is now par. 1341 * * * We conclude that 28 U.S.C.A. § 1341 does not deprive this court of jurisdiction of this action by the United States by which it seeks protection of its sovereign immunity from taxation.

"* * * Here the sole question is whether or not the United States is the real purchaser and user of the purchased articles so as to make their purchase and use immune from state taxation. That question arises under the Constitution of the United States and its answer is not dependent upon the resolution of any question of state law. It is our duty to consider the federal question, and there is no basis for a remission of the plaintiffs to the state courts." 179 F. Supp. at pages 11, 12.

§ 1341 does not deprive this court of jurisdiction. *United States* v. *United Mine Workers of America* (1947) 330 U.S. 258; *United States* v. *Woodworth* (C.A. 2, 1948), 170 F. (2d) 1019.

In order to resolve the contentions of the defendants in their entirety, however, we proceed to determine the efficacy of the argument that a plain, speedy and efficient remedy exists in the courts of Illinois. Such determination bears also on the exercise of judicial discretion which must guide us, as a federal court of equity, in determining whether or not we should grant or withhold a remedy which is within our equity power to give. *Toomer et al.* v. *Witsell et al.* (1948), 334 U.S. 385; *Great Lakes Dredge & Dock Co.* v. *Huffman* (1942), 319 U.S. 293, 301. The defendants rely on *Owens-Illinois Glass v. McKibben* (1943), 385 Ill. 245, to establish that Olin Mathieson has recourse to the courts of Illinois to enjoin the tax collection without the necessity of depositing the tax moneys due. In *Goodyear Tire & Rubber Co.* v. *Tierney* (1952), 411 Ill. 421, 427, the Illinois Supreme Court ruled that application for injunction is available only to a taxpayer when the tax is unauthorized by law, i.e., imposed when not provided for, or is levied on property which is exempt. *Owens-Illinois Glass* v. *McKibben*, *supra*, page 256; *Acme Printing Co.* v. *Nudelman* (1939), 371 Ill. 217. In the instant case it is conceded by plaintiffs that Olin Mathieson is a retailer subject to the occupation tax of Illinois. Therefore, it may not invoke the remedy of injunctive relief in the courts of Illinois.

A remedy by way of protest, hearing and court review are provided for by the Illinois Retailers' Occupation Tax Act and may be pursued without prior payment of any part of the assessment. If a taxpayer fails to pay such tax at the time he files

his return, he incurs a penalty of 10 per cent on the amount of the tax due. §§ 442, 444, Ch. 120. In addition, § 444a provides that the Department shall have a lien on all present and subsequently acquired real and personal property of the taxpayer for any unpaid tax and penalty, which lien becomes effective upon the termination of any review proceedings. A taxpayer may file suit under the Administrative Review Act without payment or deposit of the moneys due, but is required to file a bond in the amount of the unpaid tax and penalty or, in lieu of such bond, an order will be entered imposing a lien upon the taxpayer's present and subsequently acquired real and personal property. § 451, Ch. 120. The Act does not provide that the taxpayer may recover the cost of such bond. A failure to provide interest on a tax refund has been considered by the courts as evidence that a taxpayer does not have a plain, speedy and efficient remedy. (*United States* v. *Livingston, supra;* cf. *Southern Ry. Co.* v. *Query* (D.C.S.C., 1927), 21 F. (2d) 333, 342). It is the court's view that failure to provide for cost of the required bond is analogous to a failure to provide for recovery of interest on a tax refund.

It is urged that plaintiffs have available the remedy of declaratory judgment. The availability of that remedy in tax cases is uncertain. In *Goodyear Tire & Rubber Co.* v. *Tierney, supra,* page 430, the Supreme Court of Illinois observed that courts should proceed cautiously in tax cases in order to avoid interference with collection of revenues and "the cases are often such that the courts ought to deny declaratory relief". It also stated:

> "While there is a sharp division of authority on the question of whether the existence of another adequate remedy precludes proceedings

> under the Declaratory Judgments Act in tax matters, we believe that those decisions which hold that the existence of another adequate remedy is a bar to declaratory action are supported by better reason and sounder policy."

We are of the opinion that the remedies available in the courts of Illinois to the plaintiff, Olin Mathieson, are not plain, speedy and efficient. The circumstances of this case, as above stated, completely negate a possibility that there exists an adequate remedy at law such as would, under the decision in *Toomer et al. v. Witsell et al., supra,* preclude relief upon the instant application to this Court.

We are also of the opinion that the Eleventh Amendment to the Constitution of the United States is not applicable in this case. A suit to restrain unconstitutional action threatened by an individual who is a state officer, as is the defendant Director of Revenue, is not an action against the State. *Georgia R. Co, v. Redwine* (1951), 342 U.S. 299, 304. It is immaterial that the Department of Revenue is also a defendant. Its joinder must be considered in the light of the issues involved and the relief sought. *Moline Tool Co. v. Department of Revenue* (1951), 410 Ill. 35, 37; *Ex parte Young* (1907), 209 U.S. 123, 155. The action sought to be restrained as being in violation of the Federal Constitution is the collection of the occupation tax; a duty dischargeable only by the officer empowered to execute and discharge the functions of the Department of Revenue. No other activity of the state is involved. Therefore, we hold that the Department of Revenue is a nominal party and that this suit is within the rule applied to a state officer seeking to enforce an alleged unconstitutional act.

For the above and foregoing reasons, the motion of defendants to dismiss the aforesaid complaint for lack of jurisdiction is overruled.

We next proceed to a consideration of defendants' motion to dismiss the cause on its merits.

The Attorney General of the State of Illinois leans heavily on *State of Alabama* v. *King & Boozer* (1941), 314 U.S. 1, as being directly in point. Plaintiffs dispute its applicability on the authority of *Kern-Limerick* v. *Scurlock* (1953), 347 U.S. 110, 119, which expressly stated that the *King & Boozer* case left open the issue of the immunity of the United States as a purchaser,

Neither of these cases is controlling or decisive of the question presented in this case. The Alabama statute in *King & Boozer* and the Arkansas statute in *Kern-Limerick* required that the seller of the property collect the tax from the purchaser. In each of these cases, the court was called upon to decide whether, under the facts of the case, the United States was the purchaser upon whom fell the legal incidence of the tax. In *King & Boozer* it was held that the United States was not the purchaser and therefore the Alabama tax was not invalid as impinging upon the immunity of the sovereign to be free from taxation. In *Kern-Limerick* it was held that the United States was the purchaser and the legal impact of the Arkansas statute therefor fell upon a sovereign who is immune from taxation by the state.

Under the Illinois statute, with which we are concerned, it must be conceded that by virtue of the statutory language the legal incidence of the tax falls upon Olin Mathieson, a retailer engaged in the occupation of selling tangible personal property. No statutory provision compels him to collect the tax from the purchaser who, in this instance, is the United

States. In the light of the decisions of the Supreme Court of the United States since *Panhandle Oil* v. *Knox* (1927), 277 U.S. 218, we do not hold that Olin Mathieson is an agent or instrumentality of the Federal Government so as to result in an imposition of this tax upon the sovereign. The mere fact that a private corporation conducts its business under a contract with the United States does not make it an instrumentality of the latter. *United States* v. *City of Detroit, supra,* pages 471–473; *Curry* v. *United States* (1941), 314 U.S. 14. Therefore, we are not concerned here with the principle of sovereign immunity from local taxation and such doctrine does not per se prohibit the assessment of the instant tax.

In considering the validity of a state tax "we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it." *Lawrence* v. *State Tax Comm'n* (1932), 286 U.S. 276, 280. The particular name which a state legislature may give to a money payment commanded by statute is not controlling when its constitutionality is in question. *Carpenter* v. *Shaw* (1929), 280 U.S. 363, 367–368; *United States* v. *City of Detroit, supra.* The Illinois Act, by its terms, imposes the tax "upon persons engaged in the business of selling tangible personal property at retail" which falls on all who come within that classification—that is, those who sell at retail to the State of Illinois and its subdivisions and those who sell to the Federal Government as well as those who sell to private citizens and corporations.

Certain basic principles must be recognized in our approach to the problem before us. There is a strong presumption in favor of the validity of a legislative classification if any state of facts can reasonably be

conceived to sustain it and it is presumed that such state of facts exist. Statutes which tax one class while exempting another class necessarily impose a greater burden upon the person taxed than would be the case if the exempted class would be included. Such statutes do not create an inequality in the constitutional sense if all in the same class are included and treated alike. *Hart Refineries* v. *Harmon* (1928), 278 U.S. 499, 502. The legislature has the power to grant an exemption according to its views of public policy subject only to the limitation that the exemption and the classification upon which it is based be reasonable and not arbitrary. Consequently, we do not question the power of the Illinois legislature to grant an exemption to a retailer who deals with it and its political subdivisions. Indeed, such action has the beneficent objective of reducing costs of governmental administration to the benefit of its citizens.

In our view, however, a retailer who deals with the Federal Government falls within the same class as a retailer who deals with the State of Illinois. If an exemption is made from the general classification of retailers who sell tangible personal property on the legally justifiable basis of dealing with the State of Illinois, it is because such retailer deals with a governmental entity. By exempting a retailer who deals with the State of Illinois and its political subdivisions, the legislature has subdivided the retailers who transact business with governmental entities into two divisions—those who deal with the State of Illinois and its subdivisions and those who deal with the United States. To be valid, such an exemption must fall alike on all similarly situated and include retailers who deal with the Federal Government.

A reasonable consideration of difference or policy between these retailers must exist otherwise the classification is either capricious or arbitrary. *Phillips Co. v. Dumas School Dist., supra,* page 383. No enlightenment has been offered as a basis for the differentiation. It is difficult for us to perceive a reasonable distinction which grants one freedom from contributing to the cost of government and imposes the burden upon the other. Further, the imposition of the tax upon one and not the other permits the State to deal with retailers at a lower cost and imposes an increased cost upon the Federal Government dealing with the same class of persons. Assuming that the statutory exemption may have the landable public purpose of reducing governmental costs, it is equally applicable to the Federal Government thus benefiting all citizens of the United States, including the citizens of the State of Illinois.

Not only is the Federal Government discriminated against as a governmental unit in contrast to the exemption granted "the State of Illinois, any county, political subdivision or municipality thereof, or to any instrumentality or institution of any of the governmental units aforesaid" but it is further discriminated against in contrast with many non-governmental entities, specifically

> "any corporation, society, association, foundation, or institution organized and operated exclusively for charitable, religious or educational purposes."

The United States Supreme Court in *Phillips Chemical Co. v. Dumas Independent School District, supra,* condemns such discrimination. It stated:

> "a State may not single out those who deal with the government, in one capacity or another, for a tax burden not imposed on others similarly

situated. (p. 383) * * * it does not seem too much to require that the State treat those who deal with the Government as well as it treats those with whom it deals itself. (p. 385) The differences between the two classes, at least when the Government's interests are weighed in the balance seem too impalpable to warrant such a gross differentiation * * * a state tax may not discriminate against the Government or those with whom it deals." (p. 387)

For the above and foregoing reasons, we conclude that § 441, Chapter 120, Smith-Hurd Ann. Stats., as applied here, results in the imposition of a tax which discriminates against the Federal Government and those with whom it deals and is, therefore, unconstitutional.

The above and foregoing opinion of the Court constitutes the Findings of Fact and Conclusions of Law. Counsel should present an appropriate order within five (5) days.

ORDER OF DISTRICT COURT

Dated February 24, 1961

(Caption Omitted)

ORDER

This cause coming on to be heard upon the complaint of the plaintiffs, United States of America and Olin Mathieson Chemical Corporation, for the entry of a decree enjoining and restraining the defendants, Department of Revenue of the State of Illinois and Andrew Fasseas, Director of Revenue, and all persons acting under their authority and supervision, from assessing or collecting any tax under the provisions of the Illinois Sales Tax or Retailers Occupation Act of June 28, 1933, as amended (Ill. Rev. Stat. 1959

Ch. 120, § 440 ff), against or from plaintiff, Olin Mathieson Chemical Corporation or anyone else, with respect to any sales of tangible personal property which any of them have made, or hereafter may make to the United States, or any of its agencies or instrumentalities, or with respect to any proceeds received from the United States with respect to any such sales;

And a final hearing having been had by a statutory three-judge court, pursuant to Sections 2281 and 2284 of Title 28, United States Code, and upon consideration of the Amended Complaint, the Stipulation of Facts herein filed on August 31, 1960, defendant's written Motion to Dismiss Plaintiffs' Complaint for Want of Jurisdiction, or in the Alternative for Failure to State a Cause upon Which Relief May be Granted, the oral motions of the plaintiffs and defendants for judgment on the pleadings and for summary judgment, and the oral stipulations of the parties made in open Court on October 6, 1960, and oral arguments and written briefs of counsel;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED That the Plaintiffs' motions for judgment on the pleadings and summary judgment be, and the same are hereby granted; and defendants' motions to dismiss and for judgment on the pleadings and for summmary judgment be, and the same are hereby denied;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that pursuant to the opinion of this court as entered on this date, and which said opinion shall consitute the Findings of Fact and Conclusions of Law of this court in this matter, that the Department of Revenue of the State of Illinois and Andrew Fasseas, Director of Revenue, and all persons acting under their authority and supervision be, and they are hereby permanently restrained and enjoined from the making or

enforcing any assessment or collection under, or in any other way applying or enforcing the provisions of Section 2 of the Illinois Retailers Occupation Tax Act, Act of June 28, 1933 (Ill. Rev. Stat. 1959, Ch. 120, Sec. 441), against the plaintiff, Olin Mathieson Chemical Corporation, or anyone else with respect to any sales of tangible personal property which any of them have made, or hereafter may make, to the United States or any of its agencies or instrumentalities, or with respect to any proceeds received from the United States with respect to any such sales:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the provisions of the Illinois Sales Tax Act or Retailers Occupation Tax Act of June 28, 1933, as amended (Ill. Rev. Stat. 1959, Ch. 120 § 440 ff), be, and the same are hereby decreed to be violative of the Constitution of the United States and, therefore, void and of no effect as they provide for the taxation of receipts from the sales of tangible personal property to the United States or for the taxation of such sales.

ENTER:

Entered: February 24, 1961.

SECOND OPINION OF THE DISTRICT COURT

Filed March 7, 1962

(Caption omitted)

Before KNOCH, *Circuit Judge*, LA BUY and ROBSON, *District Judges*.

Pursuant to the mandate of the Supreme Court of the United States, the above cause is before us "for further consideration in the light of the developments which have occurred since the injunction was issued." *Department of Revenue of Illinois et al.* v. *United States et al.*, 368 U.S. 30 (1961).

Subsequent to our holding of the unconstitutionality of Sec. 441 of the Illinois Retailers' Occupation Tax Act (Ch. 120, Smith-Hurd Ann. Stats.) and the issuance of the aforementioned injunction, the following events occurred: (1) the Supreme Court of Illinois on May 22, 1961 in an unreported opinion, *Peo. ex rel. Holland Coal Co. v. Isaacs*, struck down the entire exemption section of the Retailers' Occupation Tax Act as being unconstitutional; (2) the Department of Revenue issued regulations to conform to that opinion by requiring collection of the occupation tax from retailers who sold to the State of Illinois, its agencies and instrumentalities, and the General Assembly of the State of Illinois in July, 1961 exempted from the measure of the occupation tax proceeds of sales to any corporation, society, association, foundation or institution organized and operated exclusively for charitable, religious or educational purposes "unless the creation of such an exemption will automatically, and contrary to the intent of this Act, exempt from the measure of the Retailers' Occupation Tax Act the proceeds of sales to the United States Government, its agencies and instrumentalities and contractors with that Government"; and (3) the Illinois Supreme Court in its second opinion issued September 22, 1961 in the *Holland Coal Co.* case (reported, 11 Ill. (2d) 477) adhered to its finding of the unconstitutionality of the exemption accorded the State of Illinois, its agencies and instrumentalities but saved the exemption accorded to proceeds of sales to charities on the ground of the separability in Sec. 441 of the exemption granted to sales at retail to governmental units from the exemption granted to sales at retail to charities, schools and churches.

Upon return of the mandate from the Supreme Court of the United States, we permitted the United

States and Olin Mathieson Chemical Corporation to file a second amended complaint wherein the fact allegations remain the same, but in which the bases of alleged discrimination have been broadened to encompass (1) the exemption of retailers who sell to charitable, religious and educational institutions with no comparable exemptions to retailers who sell to the federal government, and (2) the assessment and administration by the State of Illinois of the Retailers' Occupation Tax Act (Ch. 120, Secs. 440 *et seq.*, Smith-Hurd Ann. Stats.) and the Use Tax Act (Ch. 120, Secs. 439.1 *et seq.*, Smith-Hurd Ann. Stats.) in such manner that the incidence of the occupation tax in law and in fact is borne by the purchaser, who in the instant case is the United States and therefore violates the doctrine of sovereign immunity.

The first issue received its stimulus from language contained in our first opinion which held that the exemption provided by Sec. 441 of the Retailers' Occupation Tax Act was unconstitutional not only because it granted exemption to the class of retailers selling to Illinois, its agencies and instrumentalities and not to those who dealt with the federal government, but also because it exempted retailers who sold to certain non-governmental units such as charities, schools and churches. 191 F. Supp. 723, 729. We do not hesitate to acknowledge that the inclusion of the category of non-governmental units was neither required nor was it necessary to our determination of the unconstitutionality of Sec. 441. We shall and do hereby delete the language of our opinion which appears in the last paragraph of the first column of page 729 to the end of the quotation at the top of the second column.

However, this issue has been raised by the second amended complaint. Certain charitable, religious and

educational institutions have been permitted to intervene. It is urged that the retailer who sells to the federal government must pay the retailers' occupation tax whereas the retailer who sells to charitable, religious and educational institutions need not pay such tax resulting in discriminatory treatment.

We iterate briefly the principles applied in our first opinion. Tax exemptions are founded on public policy and are granted for the accomplishment of public purposes which will benefit the public generally. Tax exemptions are subject to the limitation that they and the classification upon which they are based be reasonable, not arbitrary, and apply to all persons similarly situated.

The exemption accorded to non-governmental institutions operated for charitable, religious and educational purposes is not of recent origin, but is the continuance of an old and well-established public policy. Article IX, Sec. 3 of the Constitution of the State of Illinois provides that property used exclusively for charitable, religious and educational purposes may be exempted from taxation by general law. The Revenue Act of the State of Illinois, Sec. 500 (1), (2), (7), Ch. 120, expressly exempts from taxation property used for such beneficient objectives. Many States of the Union have similarly provided for such exemptions from taxation. The federal government has also exempted the income of corporations organized and operated exclusively for religious, charitable or educational purposes. 26 U.S.C.A. Sec. 501(c).

The exemption of these institutions encourages their existence and relieves the State of the heavy burden of maintaining and performing these essential services. Article VIII, Sec. 3 of the Constitution of the State of Illinois forbids the use of public funds in the "aid of any church or sectarian purposes" nor

may "any grant or donation of land, money or other personal property ever be made by the state or any such public corporation, to any church, or for any sectarian purpose." Obviously, a distinct dissimilarity exists between religious institutions and governmental bodies. While charitable and educational objectives can, and are, performed through governmental units, the revenue to support them is derived from the power and authority of the government to tax its citizens for the public welfare. But no compulsory process exists to exact contributions to non-governmental organizations dedicated to the moral, spiritual and physical well-being of mankind. The financial resources to accomplish their objectives are derived from the concept of giving/voluntarily—without legal obligation or compulsion. This difference forms a reasonable basis for a separate classification and the exemption, therefore, does not discriminate against governmental bodies.

We are in accord with the holding of the Supreme Court of Illinois that the classification of governmental units and these non-governmental units is indeed separate and distinct, and that there is a reasonable classification based on differences between them; that Sec. 441 of the Illinois Retailers' Occupation Tax Act which did not exempt retailers who sold to the federal government but did exempt retailers who sold to charities, schools and churches is not unconstitutional for that reason.

The second issue was not presented at the first hearing. The second amended complaint alleges that the Illinois Use Tax Act (Ch. 120, Secs. 43911 *et seq.*) which imposes a tax on purchasers of tangible personal property, and particularly Sec. 439.8 thereof excusing a retailer from remitting such use tax to the State if he has paid the occupation tax, results in

placing the legal tax burden upon the purchaser, and therefore, in the instant case, upon the federal government. This set-off provision was not held to be unconstitutional as a gift of public funds to the retailer, or the commutation of his tax, or cancellation of a debt due because the legislature intended only one tax to reach the coffers of the State treasury. *Turner* v. *Wright*, 11 Ill. (2d) 16, app. dism. 355 U.S. 65 (1957).

The Use Tax Act does not expressly exempt the United States. However, Rule No. 3 of the Rules promulgated under that law provides in the last paragraph as follows:

> "Since the State cannot place the legal burden of a tax directly on the Federal Government or a foreign government, such governments are not required to remit the use tax directly to this State, nor can such governments be compelled to reimburse retailers for the use tax. However, this does not relieve retailers of their liability for retailers' occupation tax on receipts from retail sales to the Federal Government or to foreign governments (see paragraph 1 of Rule No. 40 of the retailers' occupation tax Rules and Regulations)."

The tax which the federal government has here assumed by contract is the tax obligation due the State of Illinois from Olin Mathieson, the retailer. Plaintiffs' argument on discrimination concedes that the use tax is not exacted from the federal government and it is urged by plaintiffs that a retailer who sells to the federal government must pay the occupation tax out of his own pocket because he cannot collect the use tax from the purchasing sovereign; whereas a retailer dealing with a purchaser who is not the federal government need not pay the occupation tax when he collects the use tax from such purchaser. This contention of "discrimination" among

retailers because of the immunity of the United States from taxation contradicts the theory urged by plaintiffs. A discrimination among taxpayers resulting from adherence to the doctrine of sovereign immunity is not only reasonable but mandatory.

The crux of plaintiffs' argument on discrimination lies in the fact that by custom and usage the retailer has "passed" his occupation tax to the buyer, including the federal government, even though the legal incidence of such tax falls on him alone. This practice of "passing" the tax to the buyer does not change the nature of that tax into the "use" tax. Such a practice is unrelated to any action taken by the State of Illinois in the administration of the occupation tax or the use tax.

We reassert that the state tax involved in *Alabama* v. *King & Boozer* (1941), 314 U.S. 1, and in *Kern-Limerick* v. *Scurlock*, 347 U.S. 110 (1953), was required by statute to be collected from the purchaser and the facts presented were determined in the context of the *legal* incidence thereof. See also *James* v. *Dravo Construction Co.*, 302 U.S. 134 (1937). So far as a different view has prevailed, see *Panhandle Oil* v. *Knox*, 277 U.S. 218 (1927), the Supreme Court of the United States has rejected it "as no longer tenable." *Alabama* v. *King & Boozer*, *supra*, pp. 8–9. We decline to apply a new criterion or to range free of the boundaries which the Supreme Court of the United States has delineated.

The defendant's motion to strike the second amended complaint is overruled; the plaintiffs' motion for a permanent injunction as prayed for in its second amended complaint is denied. An injunction will issue for the period when the State of Illinois did not assess or collect any taxes with respect to proceeds

of sales to the State of Illinois, its agencies or any of its political subdivisions.

Counsel will prepare an appropriate order for entry by the court.

/s/ WIX G. KNOCH
Judge, United States Court of Appeals.
/s/ WALTER J. LA BUY
Judge, United States District Court.

ROBSON, *D.J.*, dissenting.

I am impelled to disagree with the Court's conclusion because of the firmness of my conviction that the United States Government has been discriminated against and its sovereignty disregarded and impaired by the imposition of the instant tax. I believe there is a serious doubt that an exemption from the tax of a classification limited to charities, religious, and educational institutions has a sound basis in the law, as stated by the Court in its opinion.

While this classification may be appropriate under ordinary circumstances, I am of the opinion there is no legal justification for eleemosynary institutions being elevated to a position superior to that of the Federal Government, which has the primary responsibility of protecting our welfare and serving the public good. Assuming, as is pointed out in the cases, that technically there is a basis for differentiating between the two classifications because the Government has a means for self-support, whereas charities do not, it does not follow that the classifications exempted are entitled to receive or may receive any more favored treatment than the Government itself which, as the Illinois Supreme Court recognized, "is sharing more and more the responsibilities formerly committed solely to the state and its local govern-

ments." (*The People ex rel. Holland Coal Company v. Theodore J. Isaacs, Director of Revenue*, 22 Ill. 2d 477, 484 (1961)). This difference, therefore, under the instant facts, could be said to be dubious and illusory.

A fundamental principle of law proscribes discrimination in the treatment of the Federal Government in the imposition of taxes. It was said in *United States, et al. v. City of Detroit*, 355 U.S. 466 (1958), at p. 473:

> "It still remains true, as it has from the beginning, that a tax may be invalid even though it does not fall directly on the United States if it operates so as to discriminate against the Government or those with whom it deals. Cf. *McCulloch v. Maryland*, 4 Wheat. 316."

There could be no stronger emphasis of the immutability of this principle than was stated in the *Moses Lake Homes, Inc., et al. v. Grant County* decision, 365 U.S. 744, 751, that "*If anything is settled in the law*, it is that *a State may not discriminate against the Federal Government* * * *" (Italics supplied.) That statement was made by the United States Supreme Court in 1961. In *Phillips Chemical Co. v. Dumas Independent School District*, 361 U.S. 376 (1960), at p. 387, the Court said "[I]t still remains true * * * that a state tax may not discriminate against the Government or those with whom it deals." In upholding the validity of a state tax in the case of *City of Detroit, et al. v. Murray Corporation of America, et al.*, 355 U.S. 489 (1958), at p. 495, the same Court said: "There was no discrimination against the Federal Government, its property *or those with whom it does business.*" (Italics supplied.)

The items here subjected to the Illinois tax were

aircraft engine starter cartridges for the United States Air Force aircraft, required for national defense. They must be deemed indispensable to the functioning of the Government in its most basic aspect. The Supreme Court decisions would indicate that the State may not impede such functions of the Government by imposing taxes. In the case of *Panhandle Oil Company* v. *Mississippi, ex rel. Knox, Attorney General*, 277 U.S. 218 (1928), it was said at p. 221–222:

> "The United States is empowered by the Constitution to maintain and operate the fleet. * * * That authorization and laws enacted pursuant thereto are supreme * * * and, in case of conflict, they control state enactments. The States may *not* burden or interfere with the exertion of national power or make it a source of revenue or take the funds raised or tax the means used for the performance of federal functions. * * * The right of the United States to make such purchases is derived from the Constitution. The petitioner's right to make sales to the United States was not given by the State and does not depend on state laws; it results from the authority of the national government under the Constitution to choose its own means and sources of supply. * * * [*I*]*t* [Mississippi] *may not lay any tax upon transactions by which the United States secures the things desired for its governmental purposes.*
>
> "The validity of the taxes claimed is to be determined by the practical effect of enforcement in respect of sales to the government. * * * The amount of money claimed by the State rises and falls precisely as does the quantity of gasoline so secured by the Government. * * * The necessary operation of these enactments when so construed is directly to retard, impede and burden the exertion by the

> United States of its constitutional powers to operate the fleet. * * * To use the number of gallons sold the United States as a measure of the privilege tax is in substance and legal effect to tax the sale. * * * And that is to tax the United States. * * * .
>
> "The exactions demanded * * * infringe its right to have the constitutional independence of the United States in respect of such purchases remain untrammeled." (Italics supplied.)

Not only do I believe this tax to be illegal because discriminatory, but also because it is in violation of the sovereign immunity of the United States. This principle of sovereignty was stated in the *United States* v. *Allegheny County* case, 322 U.S. 174, at p. 177, thus:

> "* * * [U]nshaken, rarely questioned * * * is the principle that possessions, institutions, and activities of the Federal Government itself in the absence of express congressional consent are not subject to any form of state taxation."

It was there said (at p. 183) that the "purpose of the supremacy clause was to avoid the introduction of disparities, confusions and conflicts which would follow if the Government's general authority were subject to local controls."

The rule of sovereignty was clearly recognized in the case of *Kern-Limerick, Inc., et al.* v. *Scurlock, Commissioner of Revenues for Arkansas,* 347 U.S. 110 (1954), at p. 122, where the Supreme Court said:

> "The doctrine of sovereign immunity is so embedded in constitutional history and practice that this Court cannot subject the Government or its official agencies to state taxation without a clear congressional mandate."

In that case the Government was, as here, under a contract to stand the burden of the state taxes imposed. The Court said that the recognition of the constitutional immunity of the Federal Government from the state exactions rests upon unquestioned authority. A somewhat similar statement is made in *United States, et al. v. County of Allegheny*, 322 U.S. 174, 176 (1944). The Court also said in that case, at p. 186 that

> "The fact that materials are destined to be furnished to the Government does not exempt them from sales taxes imposed on the Contractor's vendor. But in all of these cases what we have denied is immunity for the contractor's *own* property, profits, or purchases. We have not held either that the Government could be taxed or its contractors taxed because property of the Government was in their hands. The distinction between taxation of private interests and taxation of governmental interests * * * is fundamental in application of the immunity doctrine as developed in this country." (Italics supplied.)

I am impressed with the importance of the principle that "in passing on the constitutionality of a state tax 'we are concerned only with its practical operation' * * * we must look through form and behind labels to substance." (*City of Detroit, et al. v. Murray Corporation of America, et al.*, 355 U.S. 489, 492 (1958)). As the Government points out in its brief, the tax, in legal incidence as well as practical operation, falls on the vendee—the United States. This was recognized by the Illinois Supreme Court in its second opinion in *People ex rel. Holland Coal Company v. Theodore J. Isaacs, Director of Revenue*, 22 Ill. 2d 477, when it said at p. 480:

> "It is the common and accepted practice of persons subject to the retailers' occupation tax to quote and collect the tax separately from the selling price. In such circumstances the burden of the tax is shifted forward to the purchaser."

But irrespective of that statement we are not bound "where a federal right is concerned * * * by the characterization given to a state tax by state courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted." *United States v. County of Allegheny*, 322 U.S. 174, 184 (1944).

The pleadings in this case disclose the very real and substantial effect which the Illinois tax actually has upon the United States which is required to pay nearly a million dollars in taxes on the aircraft parts if purchased. No charity, educational institution or religious organization is required to pay any tax on its purchases made to fulfill its functions. It therefore seems self-evident that for the United States Government to be subjected to the incidence of the tax in the purchase of parts for defense is highly discriminatory and unjust, as well as an impairment of sovereignty, and therefore unconstitutional under the ancient doctrine of *McCulloch v. Maryland*, 4 Wheat. 316, and all the numerous later cases which have adhered to its pronouncement.

It would follow from my conclusion that the tax act here involved is invalid and unconstitutional as being discriminatory against the United States and impairing its sovereignty, that I would deny defendants' motion to dismiss and allow plaintiffs' motion for entry of judgment in accordance with the prayer of the second amended complaint.

/s/ EDWIN A. ROBSON,
Judge, U.S. District Court.

ORDER OF DISTRICT COURT

(Caption omitted)

Order

(Filed 3/8/62)

At Chicago, Illinois, in said division and district, on March 8, 1962.

A hearing having been held herein on December 14, 1961, pursuant to the order of the Supreme Court of the United States dated November 6, 1961, remanding the case to this court for further consideration in the light of developments which had occurred since this court's order of February 24, 1961, and this court, on said hearing, having (a) granted leave (1) to plaintiffs to file a second amended complaint and (2) to petitioners Augustana College, Knox College, University of Chicago, Catholic Charities of the Archdiocese of Chicago, the Jewish Federation of Metropolitan Chicago, and The Illinois Hospital Association, to intervene as amici curiae, and file a brief herein, and (3) to defendants to answer the second amended complaint within ten days and (b) heard the oral arguments and concessions for the record made by each of the parties in open court and, therefore, having (c) received and read (1) plaintiffs' motions for judgment and defendants' motions to strike plaintiffs' second amended complaint and to dismiss this action, (2) plaintiffs' memoranda in support of their motions and in opposition to defendants' motions, (3) defendants' brief in response to the Supreme Court's remandment of this case, and (4) the brief and supplemental memorandum filed on behalf of the amici curiae, and due deliberation having been had thereon by Circuit Judge Win G. Knoch, and District Judges Walter J. La Buy and Edwin A.

Robson sitting as a statutory three-judge court, pursuant to Section 2281 and 2284 of Title 28, United States Code, and Judges Knoch and La Buy having concurred in and filed a majority opinion and Judge Robson having filed a dissenting opinion;

Now, upon all the pleadings and papers heretofore filed, all stipulations and concessions made, and all proceedings heretofore had herein, including all pleadings, papers, stipulations, concessions and proceedings recited herein and in this court's order of February 24, 1961, it is hereby,

Ordered, Adjudged and Decreed that defendants' motion to strike the second amended complaint is overruled and denied; and it is further

Ordered, Adjudged and Decreed that plaintiffs' motion for a permanent injunction as prayed in the second amended complaint is denied; and it is further

Ordered, Adjudged and Decreed that the Illinois Retailers' Occupation Tax Act of June 28, 1933 as amended effective August 1, 1961 (Chapter 120 Smith-Hurd Annotated Statutes §§ 441 *ff.*) provides for the taxation of receipts from the sales of tangible personal property to the United States and such provisions are not violative of the Constitutions of the United States or the State of Illinois; and it is further

Ordered, Adjudged and Decreed that the provisions of said Act which exempt proceeds of sales to any corporation, society, association, foundation, or institution organized and operated exclusively for charitable, religious or educational purposes from the application and measure of tax provided for by said Act, do not violate the Constitution of the United States or the State of Illinois, and are valid and operative and do not have the effect of exempting from the application or measure of tax provided for

by the Act the proceeds of sales to the United States, its agencies and instrumentalities and contractors with that Government; and it is further

Ordered, Adjudged and Decreed that the Department of Revenue of the State of Illinois, and Theodore J. Isaacs, Director of Revenue, and all persons acting under their authority and supervision be, and they hereby are permanently restrained and enjoined from the making or enforcing of any assessments or collections under, or in any other way applying or enforcing, any of the provisions of the Illinois Retailers' Occupation Tax Act of June 28, 1933, as amended effective August 1, 1961, (Chapter 120 Smith-Hurd Annotated Statutes §§ 441 *ff.*) against the plaintiff, Olin-Mathieson Chemical Corporation or anyone else with respect to any sales of tangible personal property which any of them made to the United States or any of its agencies or instrumentalities prior to August 1, 1961, or during any period when the taxes provided for by said Act were not assessed or collected with respect to proceeds of sales to the State of Illinois, its agencies, or any of its political subdivisions or with respect to any proceeds received from the United States with respect to any such sales; and it is further

Ordered, Adjudged and Decreed, on motion of the plaintiffs, in light of the dissenting opinion of Judge Robson, and the finding, in light of (a) the provisions of the Illinois Statutes which provide for credit rather than cash refund, and (b) the fact that no such taxes have been assessed or collected, by reason of this court's injunction, since February 24, 1961, that it would be more orderly to enable plaintiff to pursue an appeal to the Supreme Court of the United States before being subjected to the taxes in question.

it is therefore ordered that the Department of Revenue of the State of Illinois and Theodore J. Isaacs, Director of Revenue, and all persons acting under their authority and supervision be, and they hereby are, temporarily restrained from the making or enforcing of any assessments or collections under, or in any other way applying or enforcing any of the provisions of the Illinois Retailers' Occupation Tax Act of June 28, 1933, as amended effective August 1, 1961, (Chapter 120 Smith-Hurd Annotated Statutes §§ 441 *ff.*) against the plaintiff, Olin-Mathieson Chemical Corporation or anyone else with respect to any sales of tangible personal property which any of them have made or hereafter may make to the United States or any of its agencies or instrumentalities at any time with respect to any proceeds received from the United States with respect to any such sales, until plaintiffs' time to appeal to the Supreme Court of the United States has expired, and, if such an appeal or a petition for certiorari are timely filed, until the determination of the ensuing appeal.

Dated at Chicago, Illinois, this 8th day of March, A.D., 1962.

Enter:

Judge
United States Court of Appeals
Seventh Circuit

Judge
United States District Court

The defendants object to the temporary injunction pending possible appeal or petition for certiorari.

UNPRINTED OPINION OF THE SUPREME COURT OF ILLINOIS

Filed May 10, 1961

Docket No. 36480

The People ex rel. Holland Coal Company, Appellant, v. *Theodore J. Isaacs, Director of Revenue, Appellee.*

MR. JUSTICE HOUSE delivered the opinion of the court:

Holland Coal Company, an Illinois corporation, brought this action against the Director of the Department of Revenue seeking a declaratory judgment that certain exemption provisions of the Retailers' Occupation Tax Act and the Illinois Use Tax Act are unconstitutional and void and requesting the issuance of a writ of *mandamus* compelling the director to expunge departmental rules and regulations implementing the exemptions. On motion of the Director, the circuit court of Cook County struck the relator's complaint. The latter elected to abide by its pleading and the court thereupon dismissed the suit with prejudice, on the merits and at relator's cost. The revenue and the constitutionality of statutes are involved.

In 1953 section 2 of the Retailers' Occupation Tax Act was amended to exempt from the measure of the tax "the proceeds of such sales to the State of Illinois, any county, political subdivision or municipality thereof, or to any instrumentality or institution of any of the governmental units aforesaid, and excluding the proceeds of such sales to any corporation, society, association, foundation, or institution organized and operated exclusively for charitable, religious or educational purposes." (Ill. Rev. Stat. 1953, chap. 120, par. 441.) When the Use Tax Act was enacted

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in 1955, the legislature employed identical language to exempt from such tax the State, its counties, political subdivisions, municipalities, governmental instrumentalities or institutions and charities. (Ill. Rev. Stat. 1955, chap. 120, par. 439.3.) Rules and regulations have been promulgated by the Department of Revenue to implement the exemptions provided by the statutes.

The relator contends that the exemption provision in the Retailers' Occupation Tax Act violates the uniformity provision of section 1 of article IX of the Illinois construction. It argues that since the tax is imposed upon persons engaged in the business of selling tangible personal property at retail, a lack of uniformity is created within this class because some retailers will be taxed on none or less than all of their sales while others will pay on the full amount of their sales depending on the character of purchaser.

The uniformity provision of section 1 of article IX provides that a tax must be "uniform as to the class upon which it operates." Since the exemption provision does not operate in a vacuum, a determination of whether it creates a lack of uniformity cannot rest merely on an examination of the statute.

In stating the specific class upon which a tax is to be imposed, the legislature may define a general class and specifically remove a subclass (see *Bode* v. *Barrett*, 412 Ill. 204; *Modern Dairy Co.* v. *Department of Revenue*, 413 Ill. 55.) or it may merely define a subclass without naming the general class. (See *People* v. *Deep Rock Oil Corp.*, 343 Ill. 388.) "Persons engaged in the business of selling tangible personal property at retail" is a general class which the exemptive provision has in effect subclassified according to the nature of the purchaser. The legislative intent is clear that the retailers' occupation tax should apply

to that specific class of persons engaged in the business of selling tangible personal property at retail to other than the purchasers named in the exemptive provision. This specific class is the same whether it is defined as we have just done or by the use of an exemption as the legislature has done. The basic question is not the manner in which the class to be taxed has been defined, however, but whether there is any reasonable basis for the classification.

The legislature in levying an occupation tax has great latitude in establishing the class to which the tax shall apply. (*Reif* v. *Barrett*, 355 Ill. 104; *Ohio Oil Co.* v. *Wright*, 386 Ill. 206; *McGrath* v. *City of Chicago*, 309 Ill. 515.) The classifications in tax statutes must be based upon real and substantial differences between persons taxed and those not taxed (*Ohio Oil Co.* v. *Wright*, 386 Ill. 206; *City of Chicago* v. *Ames*, 365 Ill. 529), and they must bear some reasonable relationship to the object of the legislation (*Modern Dairy Co.* v. *Department of Revenue*, 413 Ill. 55), or to public policy, *Reif* v. *Barrett*, 355 Ill. 104.

We do not agree with relator's assertion that basing the classification on the identity of the purchaser shows that the classification is arbitrary and capricious. It is the common and accepted practice of persons subject to the retailers' occupation tax to quote and collect the tax separately from the selling price. In such circumstances the burden of the tax is shifted forward to the purchaser. The obvious purpose of the legislature in enacting the exemption was to protect governmental units and charities from the burden of the tax that is shifted to them. Reduced costs of government and reduced costs of charities, which relieve the State of many burdens it would otherwise be obliged to bear, will result when

these purchasers can deal with retailers who are not subject to the tax. Although the classification is based in part on the identity of the purchaser, it takes into account the economic effect of the tax. We believe that such classification is not arbitrary or capricious but bears a reasonable relation to public policy.

It is also contended that the 1953 exemption in the Retailers' Occupation Tax Act and the identical and companion exemption granted in the Use Tax Act are unconstitutional because they discriminate against the Federal government. It is well settled that uniformity may be violated by including within a class those not in fact within the class. (*Banghart* v. *Walsh,* 339 Ill. 132; *Wedesweiler* v. *Brundage,* 297 Ill. 228; *Scully* v. *Hallihan,* 365 Ill. 185; *Swithiod Singing Club* v. *McKibbin,* 381 Ill. 194), as well as by excluding from a class those properly belonging to it. *Lippman* v. *People,* 175 Ill. 101; *City of Chicago* v. *Ames,* 365 Ill. 529; *Ohio Oil Co.* v. *Wright,* 386 Ill. 206.

The relator has set out in full in its brief an opinion rendered on February 24, 1961, by a bench of three judges sitting in the United States District Court for the Northern District of Illinois in which it was held that Illinois may not tax retail sellers of tangible personal property with respect to sales to the United States Government or to contractors with the Government so long as Illinois exempts from the measure of that tax similar sales to the State of Illinois, its agencies, instrumentalities, municipalities and charities. (*United States* v. *Department of Revenue of Illinois,* 191 F. Supp. 723, No. 60 C 1365.) The district court found that there was no reasonable basis for putting those retailers who deal with the Federal government in a class different from those who deal with the State, its agencies, municipalities and

charities. Since the exemption places those who deal with the Federal government in a class different from that of those who deal with the governmental units and charities defined in the exemption, the court held the imposition of the tax with respect to sales to or for the use of the Federal government works an unconstitutional discrimination against, and therefore, infringes, the sovereignty of the Federal government, so long as similar sales to the State, its counties, municipalities and charities do not measure the tax.

The most recent opinion of the Supreme Court on this subject is *Phillips Chemical Co.* v. *Dumas Independent School Dist.*, 361 U.S. 376, 80 S. Ct. 474, 4 L. ed. 2d 384. In that case a tax had been imposed upon the lessees of real estate and was measured by the full value of the property. The lessees of the State or one of its political subdivisions were not taxed however. The court could find no reasonable basis to support the Government's lessees being placed in a class different from that of the lessees of the State and its agencies. In holding that the tax could not be exacted from the Government's lessees the court stated. "* * * it does not seem too much to require that the State treat those who deal with the Government as well as it treats those with whom it deals itself." 361 U.S. 376, 385.

While the Attorney General has pointed to several facts which distinguish the *Phillips Chemical Co.* case from this one, we believe the distinction is without a difference.

The judgment of the circuit court of Cook County is reversed. However, we see no purpose in remanding the cause for the issuance of a writ of *mandamus* directing the respondent to expunge the offending departmental regulations. Since the statutes upon which the regulations are predicated are invalid, the rules

themselves become void and we will not presume that respondent will attempt to act illegally in the face of our finding that the exemption provisions are unconstitutional.

Judgment reversed.

SUPERSEDING OPINION OF THE SUPREME COURT OF ILLINOIS

Filed September 22, 1961

[Caption Omitted]

Mr. JUSTICE HOUSE delivered the opinion of the court:

Holland Coal Company, an Illinois corporation, brought this action against the Director of the Department of Revenue seeking a declaratory judgment that certain exemption provisions of the Retailers' Occupation Tax Act and the Illinois Use Tax Act are unconstitutional and void and requesting the issuance of a writ of *mandamus* compelling the director to expunge departmental rules and regulations implementing the exemptions. On motion of the Director, the circuit court of Cook County struck the relator's complaint. The latter elected to abide by its pleading and the court thereupon dismissed the suit with prejudice, on the merits and at relator's cost. The revenue and the constitutionality of statutes are involved.

In 1953 section 2 of the Retailers' Occupation Tax Act was amended to exempt from the measure of the tax "the proceeds of such sales to the State of Illinois, any county, political subdivision or municipality thereof, or to any instrumentality or institution of any of the governmental units aforesaid, and excluding the proceeds of such sales to any corporation, society, association, foundation, or institution organized and operated exclusively for charitable, religious or edu-

cational purposes." (Ill. Rev. Stat. 1953, chap. 120, par. 441.) When the Use Tax Act was enacted in 1955, the legislature employed identical language to exempt from such tax the State, its counties, political subdivisions, municipalities, governmental instrumentalities or institutions and charities. (Ill. Rev. Stat. 1955, chap. 120, par. 439.3.) Rules and regulations have been promulgated by the Department of Revenue to implement the exemptions provided by the statutes.

The relator contends that the exemption provision in the Retailors' Occupation Tax Act violates the uniformity provision of section 1 of article IX of the Illinois constitution. It argues that since the tax is imposed upon persons engaged in the business of selling tangible personal property at retail, a lack of uniformity is created within this class because some retailers will be taxed on none or less than all of their sales while others will pay on the full amount of their sales depending on the character of purchaser.

The uniformity provision of section 1 of article IX provides that a tax must be "uniform as to the class upon which it operates." Since the exemption provision does not operate in a vacuum, a determination of whether it creates a lack of uniformity cannot rest merely on an examination of the statute.

In stating the specific class upon which a tax is to be imposed, the legislature may define a general class and specifically remove a subclass (see *Bode* v. *Barrett*, 412 Ill. 204; *Modern Dairy Co.* v. *Department of Revenue*, 413 Ill. 55, or it may merely define a subclass without naming the general class. (See *People* v. *Deep Rock Oil Corp.* 343 Ill. 388.) "Persons engaged in the business of selling tangible personal property at retail" is a general class which the exemptive provision has in effect subclassified according to the nature of the purchaser. The legislative intent is

clear that the retailers' occupation tax should apply to that specific class of persons engaged in the business of selling tangible personal property at retail to other than the purchasers named in the exemptive provision. This specific class is the same whether it is defined as we have just done or by the use of an exemption as the legislature has done. The basic question is not the manner in which the class to be taxed has been defined, however, but whether there is any reasonable basis for the classification.

The legislature in levying an occupation tax has great latitude in establishing the class to which the tax shall apply. (*Reif* v. *Barrett*, 355 Ill. 104; *Ohio Oil Co.* v. *Wright*, 386 Ill. 206; *McGrath* v. *City of Chicago*, 309 Ill. 515.) The classifications in tax statutes must be based upon real and substantial differences between persons taxed and those not taxed, (*Ohio Oil Co.* v. *Wright*, 386 Ill 206; *City of Chicago* v. *Ames*, 365 Ill. 529,) and they must bear some reasonable relationship to the object of the legislation. (*Modern Dairy Co.* v. *Department of Revenue*, 413 Ill. 55,) or to public policy. *Reif* v. *Barrett*, 355 Ill. 104.

We do not agree with relator's assertion that basing the classification on the identity of the purchaser shows that the classification is arbitrary and capricious. It is the common and accepted practice of persons subject to the retailers' occupation tax to quote and collect the tax separately from the selling price. In such circumstances the burden of the tax is shifted forward to the purchaser. The obvious purpose of the legislature in enacting the exemption was to protect governmental units and charities from the burden of the tax that is shifted to them. Reduced costs of government and reduced costs of charities, which relieve the State of many burdens it

would otherwise be obliged to bear, will result when these purchasers can deal with retailers who are not subject to the tax. Although the classification is based in part on the identity of the purchaser, it takes into account the economic effect of the tax. We believe that such classification is not arbitrary or capricious but bears a reasonable relation to public policy.

It is also contended that the 1953 exemption in the Retailers' Occupation Tax Act and the identical and companion exemption granted in the Use Tax Act are unconstitutional because they discriminate against the Federal government. It is well settled that uniformity may be violated by including within a class those not in fact within the class, (*Banghart* v. *Walsh*, 339 Ill. 132; *Wedesweiler* v. *Brundage*, 297 Ill. 228; *Scully* v. *Hallihan*, 365 Ill. 185; *Swithiod Singing Club* v. *McKibbin*, 381 Ill. 194.) as well as by excluding from a class those properly belonging to it. *Lippman* v. *People*, 175 Ill. 101; *City of Chicago* v. *Ames*, 365 Ill. 529; *Ohio Oil Co.* v. *Wright*, 386 Ill. 206.

The relator has set out in full in its brief an opinion rendered on February 24, 1961, by a bench of three judges sitting in the United States District Court for the Northern District of Illinois in which it was held that Illinois may not tax retail sellers of tangible personal property with respect to sales to the United States Government or to contractors with the Government so long as Illinois exempts from the measure of that tax similar sales to the State of Illinois, its agencies, instrumentalities, municipalities and charities. (*United States and Olin Mathieson Chemical Corp.* v. *Department of Revenue of Illinois*, 191 F. Supp. 723.) The district court found that there was no reasonable basis for putting those

retailers who deal with the Federal government in a class different from those who deal with the State, its agencies, municipalities and charities. Since the exemption places those who deal with the Federal government in a class different from that of those who deal with the governmental units and charities defined in the exemption, the court held the imposition of the tax with respect to sales to or for the use of the Federal government works an unconstitutional discrimination against, and therefore infringes, the sovereignty of the Federal government, so long as similar sales to the State, its counties, municipalities and charities do not measure the tax.

The most recent opinion of the Supreme Court on this subject is *Phillips Chemical Co. v. Dumas Independent School Dist.* 361 U.S. 376, 80 S. Ct. 474, 4 L. ed. 2d 384. In that case a tax had been imposed upon the lessee of real estate and was measured by the full value of the property. The lessees of the State or one of its political subdivisions were not taxed however. The court could find no reasonable basis to support the Government's lessees being placed in a class different from that of the lessees of the State and its agencies. In holding that the tax could not be exacted from the Government's lessees, the court stated, "* * * it does not seem too much to require that the State treat those who deal with the Government as well as it treats those with whom it deals itself." 361 U.S. 376, 385.

The clear holding of the *Phillips Chemical Co.* case is that those dealing with the Federal government belong to the same class as those dealing with the State and its political subdivisions. The exemption provisions in question have failed to include those who deal with the Federal government within the class to which they belong. For that reason, we hold

those portions of the provisions of the Retailers' Occupation Tax Act and the Use Tax Act exempting from the measure of the tax the proceeds of sales at retail to the "State of Illinois, any county, political subdivision or municipality thereof," to be unconstitutional and void.

This holding brings into issue the validity of the provisions which exempt from the measure of the Retailers' Occupation Tax and the Use Tax the proceeds of sales at retail to "any corporation, society, association, foundation or institution organized and operated exclusively for charitable, religious or educational purposes." Governmental units and charities are generally exempted from taxation because such exemptions directly or indirectly tend to lower the cost of government. (See *e.g.*, *Milward* v. *Paschen*, 16 Ill. 2d 302; *People ex rel. Brenza* v. *Turnverein Lincoln*, 8 Ill. 2d 198.) There are, however, real and substantial differences between them, one of which is the power possessed by governmental units to enforce contribution from persons and property to support their purposes, (cf. *Kough* v. *Hoehler*, 413 Ill. 409; see also 31 I.L.P. Revenue § 2,) a power which charities do not possess. We hold that governmental units and those with whom they deal can be placed in a class and be treated different from charities and those with whom they deal.

The three-judge district court in the *Olin Mathieson Chemical Corp. case* stated that the Federal government is further discriminated against by the charitable exemptions in question. (191 F. Supp. 723, 729.) This statement was not necessary to the decision nor was that issue discussed in any detail. A close reading of the *Phillips Chemical Co.* case, upon which the district court relied in issuing its permanent injunction, leads us to the conclusion that

it requires no more than that the State treat those who deals with the Federal government as favorably as it treats those with whom it deals itself (361 U.S. 376, 385, 80 S. Ct. 474, 480, 4. L. ed. 2d 384, 391), and specifically reserves the question of whether a class in which the State has not been included can be given a more favorable treatment than the Federal government.

As we have mentioned, tax exemptions are often given to charities because the benefits they confer upon the public reduce the burden of government to care for and advance the interests of its citizens. While in the past charitable benevolences operated to a greater extent in reducing the burden of State and local governments, today these benevolences greatly reduce the burden of the Federal government which has and is sharing more and more the responsibilities formerly committed solely to the State and its local governments. The teaching of the *Phillips Chemical Co. case* is not that the State is prohibited from treating a class more favorably than itself, its political subdivisions and the Federal government or those who deal with them, but that there be significant differences between the two classes when the Federal government's interests are weighed in the balance. We are of the opinion that there are significant differences between those who deal with governmental units and those who deal with charities which justify treating the latter more favorably even when the Federal government's interests are weighed in the balance.

The question remaining is one of separability. We have frequently held that if those provisions of a statute which remain after the unconstitutional portion has been stricken are complete in themselves and capable of being executed wholly independently of

that which is void, the invalid portion does not render the entire section or act unconstitutional unless it can be said that the legislature would not have passed the statute with the invalid portion eliminated. (*Myers* v. *Krajefska*, 8 Ill. 2d 322; *Vissering Mercantile Co.* v. *Annunzio*, 1 Ill. 2d 108; *Grasse* v. *Dealer's Transport Co.* 412 Ill. 179.) This is true even if the valid and invalid provisions are contained in the same sentence. *People ex rel. Adamowski* v. *Wilson*, 20 Ill. 2d 568, *McDougall* v. *Lueder*, 389 Ill. 441.

The provisions of the Retailers' Occupation Tax Act and the Use Tax Act exempting the proceeds of sales at retail to governmental units is separate from and independent of the exemption of the proceeds of sales at retail to charities. The passage subsequent to our original opinion herein, of House Bills Nos. 1609 and 1610 amending section 2 of the Retailers' Occupation Tax Act and section 3 of the Use Tax Act, respectively, by removing all governmental units from the exemptive provisions of those sections, shows a definite legislative intent that the provisions relating to charities should remain.

The judgment of the circuit court of Cook County is reversed insofar as it holds the provisions of section 2 of the Retailers' Occupation Tax Act and section 3 of the Use Tax Act excluding from the measure of the taxes the proceeds of sales at retail to the State of Illinois, any county, political subdivision or municipality thereof to be constitutional. Under the circumstances, it can be presumed that respondent will act in conformity with our decision and it will be unnecessary to remand the cause for the issuance of a writ of *mandamus* directing the respondent to expunge the offending portions of the departmental regulations.

APPENDIX B

Sales Tax or Retailers' Occupation Tax Act, 2 Illinois Revised Statutes (1961), c. 120:

440. *Terms defined.* Sec. 1. "Sale at retail" means any transfer (conditional or otherwise) of the ownership of, or title to, or possession of, or the right to the possession of, tangible personal property to a purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration.

"Sale at retail" shall be construed to include any transfer of the ownership of, or title to, or possession of, or the right to the possession of, tangible personal property to a purchaser, for use or consumption by any other person to whom such purchaser may transfer the tangible personal property without a valuable consideration.

Sales of tangible personal property, which property as an ingredient or constituent goes into and forms a part of tangible personal property subsequently the subject of a "sale at retail", are not sales at retail as defined in this Act.

"Purchaser" means any one who, through a sale at retail, acquires the ownership of, or title to, or possession of, or the right to the possession of, tangible personal property for a valuable consideration.

"Selling price" or the "amount of sale" means the consideration for a sale valued in money whether received in money or otherwise, including cash, credits and services, but not including the value of or credit given for traded-in property of every kind or nature, and shall be determined without any deduction on

account of the cost of the property sold, the cost of materials used, labor or service cost or any other expense whatsoever, but shall not include charges that are added to prices by sellers on account of the seller's tax liability under this Act, or on account of the seller's duty to collect, from the purchaser, the tax that is imposed by the Use Tax Act, or on account of the seller's tax liability under the Municipal Retailers' Occupation Tax Act, or on account of the seller's tax liability under the County Retailers' Occupation Tax Act; provided, however, that the "selling price" may, at the election of the person transferring tangible personal property pursuant to a lease or rental agreement, mean the retail selling price which the lessee-purchaser would normally have been required to pay for the property at that time if the lessee-purchaser had bought the property in the ordinary sense of a purchase instead of leasing it.

"Gross receipts" from the sales of tangible personal property at retail means the total selling price or the amount of such sales, as hereinbefore defined. In the case of charge and time sales the amount thereof shall be included only as and when payments are received by the seller.

"Department" means the Department of Revenue.

"Person" means any natural individual, firm, partnership, association, joint stock company, joint adventure, public or private corporation, or a receiver, executor, trustee, conservator or other representative appointed by order of any court.

The isolated or occasional sale of tangible personal property at retail by a person who does not hold himself out as being engaged (or who does not habitually engage) in selling such tangible personal property at retail does not constitute engaging in a busi-

ness of selling such tangible personal property at retail within the meaning of this Act; provided that any person who is engaged in a business which is not subject to the tax imposed by this Act because of involving the sale of or a contract to sell real estate or a construction contract to improve real estate, but who, in the course of conducting such business, transfers tangible personal property to users or consumers in the finished form in which it was purchased, and which does not become real estate, under any provision of a construction contract or real estate sale or real estate sales agreement entered into with some other person arising out of or because of such nontaxable business, shall be considered to be engaged in the business of selling tangible personal property at retail to the extent of the value of the tangible personal property so transferred. If, in such a transaction, a separate charge is made for the tangible personal property so transferred, the value of such property, for the purpose of this Act, shall be the amount so separately charged, but not less than the cost of such property to the transferor; if no separate charge is made, the value of such property, for the purposes of this Act, shall be the cost to the transferor of such tangible personal property.

Persons who engage in the business of repairing tangible personal property for others by adding or incorporating therein other tangible personal property for use or consumption shall be deemed to be engaged in the business of selling tangible personal property at retail within the meaning of this Act when engaging in any such business and shall not be regarded as being engaged primarily in a service occupation in such transactions.

441. *Imposition of tax—Exception.* Sec. 2. A tax is imposed upon persons engaged in the business of

selling tangible personal property at retail at the rate of 2½% of the gross receipts from such sales of tangible personal property made in the course of such business prior to July 1, 1959, or after June 30, 1963, and at the rate of 3½% of the gross receipts from such sales after June 30, 1959, and prior to July 1, 1961, excluding, however, from said gross receipts, the proceeds of such sales to any corporation, society, association, foundation, or institution organized and operated exclusively for charitable, religious or educational purposes. However, such tax is not imposed upon the privilege of engaging in any business in interstate commerce or otherwise, which business may not, under the constitution and statutes of the United States, be made the subject of taxation by this State.

* * * * * *

442. *Monthly return—Payment of tax—Disposition of proceeds.* Sec. 3. On or before the last day of each calendar month, every person engaged in the business of selling tangible personal property at retail in this State during the preceding calendar month shall file a return with the Department, stating:

1. The name of the seller;

2. His residence address and the address of his principal place of business and the address of the principal place of business (if that is a different address) from which he engages in the business of selling tangible personal property at retail in this State;

3. Total amount of receipts received by him during the preceding calendar month from sales of tangible personal property, and from services furnished, by him during such preceding calendar month;

4. Total amount received by him during the preceding calendar month on charge and time sales of tangible personal property, and from services furnished,

by him prior to the month for which the return is filed;

5. Deductions allowed by law;

6. Gross receipts which were received by him during the preceding calendar month and upon the basis of which the tax is imposed;

7. The amount of tax due;

8. The amount of penalty due, if any;

9. Such other reasonable information as the Department may require.

Where the same person has more than one (1) business registered with the Department under separate registrations under this Act, such person shall not file each return that is due as a single return covering all such registered businesses, but shall file separate returns monthly for each such registered business.

Refunds made by the seller during the preceding calendar month to purchasers, on account of tangible personal property returned to the seller, shall be allowed as a deduction under subdivision 5, in case the seller had theretofore included the receipts from the sale of such tangible personal property in a return filed by him and had paid the tax imposed by this Act with respect to such receipts.

Where the seller is a corporation, the return filed on behalf of such corporation shall be signed by the president, vice-president, secretary or treasurer or by the properly accredited agent of such corporation.

The person filing the return herein provided for shall, at the time of filing such return, pay to the Department the amount of tax herein imposed less a discount of 2% which is allowed to reimburse the taxpayer for the expenses incurred in keeping records, preparing and filing returns, remitting the tax and supplying data to the Department on request. Of the

moneys received by the Department under the provisions of this Act, after July 31, 1959 and prior to August 1, 1963, 5/7 thereof shall be paid into the State treasury, and 2/7 shall be reserved in a special account and used only for the transfer to the Common School Fund as part of the monthly transfer from the General Revenue Fund in accordance with Section 8½ of "An Act in relation to State finance", approved June 10, 1919, as amended.

All moneys received by the Department hereunder prior to August 1, 1959, or after July 31, 1963, shall be paid into the General Revenue Fund of the State treasury.

RETAILERS' OCCUPATION TAX ACT—STATE TO PAY SALES TAX.

§ 1. Declaration.
§ 2. Amends Section 2 of Act of 1933.
§ 2. Tax Imposed on Business of Selling Tangible Personal Property at Retail.

(HOUSE BILL No. 1609. APPROVED JULY 31, 1961.)

AN ACT to amend Section 2 of the Retailers' Occupation Tax Act, approved June 28, 1933, as amended, for the purpose of exempting from the measure of the retailers' occupation tax the proceeds of sales to charitable, religious or educational institutions if, but only if, such sales can be exempted from the measure of that tax without the creation of an exemption from the measure of that tax for the proceeds from sales to the United States Government, its agencies, instrumentalities or contractors.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

SECTION 1. The General Assembly recognizes and declares that corporations, societies, associations, foundations and institutions organized and operated exclusively for charitable, religious or educational

purposes relieve the State of many burdens it would otherwise be obliged to bear, and that it is in the public interest to take into account the economic effect of the fact that the actual burden of the tax imposed by this Act is passed on to, and therefore falls upon such institutions. But the General Assembly recognizes that there is judicial opinion and it is the present view and assertion of the Department of Justice of the United States that if a State exempts the proceeds of sales to charitable, religious or educational institutions from a tax that would otherwise be measured by the gross receipts from such sales, such an exemption discriminates against the United States Government and therefore operates automatically to exclude from the measure of any such tax the proceeds of sales to the United States Government, its agencies, instrumentalities or contractors with the United States Government.

The General Assembly recognizes that the United States presently assumes and bears the economic burden of taxes measured by the gross receipts from sales to or for the use of that Government except in states which tax those sales while exempting sales to other governmental bodies, charitable, religious or educational institutions, which exemptions the Department of Justice asserts and some judicial opinions hold unconstitutionally discriminate against the Government of the United States.

The General Assembly declares it to be in the public interest and the public policy of the State of Illinois to exempt from the measure of the Retailers' Occupation Tax Act the proceeds of sales to any corporation, society, association, foundation, or institution organized and operated exclusively for charitable, religious or educational purposes, unless the creation of such an exemption will automatically, and contrary to the intent of this Act, exempt from the measure of the Retailers' Occupation Tax Act the proceeds of sales

to the United States Government, its agencies and instrumentalities and contractors with that Government.

§ 2. Section 2 of the Retailers' Occupation Tax Act, approved June 28, 1933, as amended, is amended to read as follows:

§ 2. A tax is imposed upon persons engaged in the business of selling tangible personal property at retail at the rate of 2½% of the gross receipts from such sales of tangible personal property made in the course of such business prior to July 1, 1959, or after June 30, 1961, and at the rate of 3% of the gross receipts from such sales after June 30, 1959, and prior to July 1, 1961, excluding, however, from said gross receipts, the proceeds of such sales to any corporation, society, association, foundation, or institution organized and operated exclusively for charitable, religious or educational purposes. However, such tax is not imposed upon the privilege of engaging in any business in interstate commerce or otherwise, which business may not, under the constitution and statutes of the United States, be made the subject of taxation by this State.

Passed General Assembly June 30, 1961.

Approved July 31, 1961.

(Ill Rev. Stat. Vol 2, p. 1389.)

Use Tax Act, 2 Illinois Revised Statutes (1961), c. 120:

439.1 *Title.* Sec. 1. This Act shall be known and may be cited as the "Use Tax Act."

* * * * *

439.3 *Tangible personal property purchased at retail—Use tax—Rate—Collection and remittance—Exceptions.* Sec. 3. A tax is imposed upon the privilege of using in this State tangible personal property purchased at retail on and after August 1,

1955, from a retailer. Such tax is at the rate of 2½% of the selling price of such property if purchased before July 1, 1959, or after June 30, 1963, and at the rate of 3½% of the selling price of such property if purchased after June 30, 1959, and prior to July 1, 1963: Provided that if the property that is purchased at retail from a retailer is acquired outside Illinois and used outside Illinois before being brought to Illinois for use here and is nevertheless taxable hereunder, the "selling price" on which the tax is computed shall be reduced by an amount which represents a reasonable allowance for depreciation for the period of such prior out-of-State use.

The tax hereby imposed shall be collected from the purchaser by a retailer maintaining a place of business in this State or a retailer authorized by the Department pursuant to Section 6 hereof, and remitted to the Department, pursuant to the provisions of Section 9 hereof.

The tax hereby imposed and not paid to a retailer pursuant to the preceding paragraph of this Section shall be paid to the Department directly by any person using such property within this State, pursuant to the provisions of Section 10 hereof.

Retailers shall collect the tax from users by adding the tax to the selling price of tangible personal property, when sold for use, in the manner prescribed by the Department. The Department shall have the power to adopt and promulgate reasonable rules and regulations for the adding of such tax by retailers to selling prices by prescribing bracket systems for the purpose of enabling such retailers to add and collect, as far as practicable, the amount of such tax.

The tax herein imposed shall not apply to any corporation, society, association, foundation, or institution, organized and operated exclusively for charitable,

religious or educational purposes, when using tangible personal property purchased at retail.

To prevent actual or likely multistate taxation, the tax herein imposed shall not apply to the use of tangible personal property in this State under the following circumstances;

(a) The use, in this State, of tangible personal property acquired outside this State by a non-resident individual and brought into this State by such individual for his or her own use while temporarily within this State or while passing through this State;

(b) the use, in this State, of tangible personal property which is acquired outside this State and which is moved into this State for use as rolling stock moving in interstate commerce;

(c) the use, in this State, of tangible personal property which is acquired outside this State and caused to be brought into this State by a person who has already paid a tax in another state in respect to the sale, purchase or use of such property, to the extent of the amount of such tax so paid in such other state;

(d) the temporary storage, in this State, of tangible personal property which is acquired outside this State and which subsequent to being brought into this State and stored here temporarily, is used solely outside this State or physically attached to, or incorporated into other tangible personal property that is used solely outside this State.

If the seller of tangible personal property for use would not be taxable under the Retailers' Occupation Tax Act despite all elements of the sale occurring in Illinois, then the tax imposed by this Act shall not apply to the use of such tangible personal property in this State.

The tax imposed by this Act shall not apply to the use, in this State, of tangible personal property which

is acquired outside this State by a non-resident individual who then brings the property to this State for use here, and who shall have used the property outside this State for at least 3 months before bringing the property to this State.

Where a business that is not operated in Illinois, but which does operate in another State, is moved to Illinois or opens up an office, plant or other business facility in Illinois, such business shall not be taxed on its use, in Illinois, of used tangible personal property which such business bought outside Illinois and used outside Illinois in the operation of such business for at least 3 months before moving such used property to Illinois for use here.

* * * * * *

439.7 *Direct or indirect advertisement that retailer will absorb tax prohibited—Penalties.* Sec. 7. It is unlawful for any retailer to advertise or hold out or state to the public or to any purchaser, consumer or user, directly or indirectly, that the tax or any part thereof imposed by Section 3 hereof will be assumed or absorbed by the retailer or that it will not be added to the selling price of the property sold, or if added that it or any part thereof will be refunded other than when the retailer refunds the selling price and tax because of the merchandise's being returned to the retailer or other than when the retailer credits or refunds the tax to the purchaser to support a claim filed with the Department under the Retailers' Occupation Tax Act or under this Act. Any person violating any of the provisions of this Section within this State shall be guilty of a misdemeanor and subject to the penalties provided in this Act.

439.8 *Tax collected as debt owed to state—Exception.* Sec. 8. The tax herein required to be collected by any retailer pursuant to this Act, and any such

tax collected by any retailer shall constitute a debt owed by the retailer to this State, except when such retailer is relieved of the duty of remitting such tax to the Department by virtue of his being required to pay the tax imposed by the Retailers' Occupation Tax Act upon his gross receipts from the same transaction.

439.9 *Due date—Conditiongl sales—Refunds—Joint and separate returns—Fund*

Each retailer required or authorized to collect the tax herein imposed shall pay to the Department the amount of such tax (except as otherwise provided), on or before the last day of the month following the calendar month during which such tax was collected, less a discount of 2% which is allowed to reimburse the retailer for expenses incurred in collecting the tax, keeping records, preparing and filing returns, remitting the tax and supplying data to the Department on request. A retailer need not remit that part of any tax collected by him to the extent that he is required to remit and does remit the tax imposed by the Retailers' Occupation Tax Act with respect to the sale of the same property.

* * * * * *

Rules and Regulations under Illinois Retailers' Occupation Tax Act (January, 1962, ed.), Illinois Department of Revenue:

Article No. 1.

NATURE OF TAX

* * * * * *

RELATION OF RETAILERS' OCCUPATION TAX TO USE TAX

The retailers' occupation tax is an occupation tax whose legal incidence is on the seller, rather than on the purchaser. However, with the enactment of the Use Tax Act in 1955, the retailer became a tax collector under that Act and is required to comply with

the bracket systems or tax collection schedules prescribed in the Department's use tax Rules and Regulations for the collection of the use tax by retailers from users. There no longer is any occasion for the retailer to shift the burden of the retailers' occupation tax since he will reimburse himself for his retailers' occupation tax liability by collecting the use tax from his customers, except in rare situations in which the retailers' occupation tax would apply but the use tax would not apply (such as in the case of sales to foreign governments).

* * * * *

Rule No. 16.

SALES TO THE UNITED STATES GOVERNMENT, ITS AGENCIES OR INSTRUMENTALITIES

1. Except as noted in paragraph 2 of this Rule, effective August 1, 1961, persons engaged in the business of selling tangible personal property incur retailers' occupation tax liability when selling any such property to the United States Government or to any of its agencies or instrumentalities, for use or consumption and not for resale.

2. Notwithstanding the fact that a school or a hospital may be an agency or instrumentality of the United States Government, such institutions still qualify for total exemption as purchasers on the ground of being a school, or on the ground of being a nonprofit hospital (and therefore charitable), as provided in paragraphs 2, h, and 2, i, of Rule No. 38 of the retailers' occupation tax Rules and Regulations.

In exempting sales to schools and charities, the Department does not believe the General Assembly intended to differentiate between publicly owned and privately owned schools and charitable institutions. This exemption for schools and charitable institutions

as purchasers extends to any government-owned school or charitable institution (Federal, State or local). This exemption does not include penal institutions as buyers.

For information concerning the status, generally, of persons making sales to governmental bodies other than the Government of the United States, see Rule No. 40 of the retailers' occupation tax Rules and Regulations.

* * * * *

Rule No. 40.

SALES TO GOVERNMENTAL BODIES, THEIR AGENCIES AND INSTRUMENTALITIES

1. Except as noted in paragraph 2 of this Rule, effective August 1, 1961, persons engaged in the business of selling tangible personal property incur retailers' occupation tax liability when selling any such property to the State of Illinois or to local governments, their agencies or instrumentalities, for use or consumption and not for resale. The same is true as to similar sales to the governments of or within other states of the United States, or to foreign governments, their agencies or instrumentalities.

2. Notwithstanding the fact that a school or a hospital may be an agency or instrumentality of the State of Illinois or other governmental body, such institutions still qualify for total exemption as purchasers on the ground of being a school, or on the ground of being a nonprofit hospital (and therefore charitable), as provided in paragraphs 2, h, and 2, i, of Rule No. 38 of the retailers' occupation tax Rules and Regulations. The same is true of sales to such other government-owned institutions as government-owned sanataria, government-owned nursing

homes, local housing authorities (even though they are municipal corporations), and free public libraries that are not operated for profit and that are not operated by commercial enterprises, even when such libraries are governmental units.

In exempting sales to schools and charities, the Department does not believe the General Assembly intended to differentiate between publicly owned and privately owned schools and charitable institutions. This exemption for schools and charitable institutions as purchasers extends to any government-owned school or charitable institution (Federal, State or local). This exemption does not include penal institutions as buyers.

For information concerning the status, generally, of persons making sales to the Government of the United States, see Rule No. 16 of the retailers' occupation tax Rules and Regulations.

Rules and Regulations under Illinois Use Tax Act (January 1962, ed.), Illinois Department of Revenue:

Rule No. 3.

KINDS OF USES AND USERS NOT TAXED

* * * * *

7. GOVERNMENTAL BODIES AS BUYERS

Since the State cannot place the legal burden of a tax directly on the United States Government or a foreign government, such governments are not required to remit the use tax directly to this State, nor can such governments be compelled to reimburse retailers for the use tax.

However, for information concerning the status of retailers under the Retailers' Occupation Tax Act, when making sales to the United States Government, its agencies or instrumentalities, or to foreign govern-

ments, their agencies or instrumentalities, see Rules No. 16 and 40 of the retailers' occupation tax Rules and Regulations.

For information concerning the status of governmental bodies other than the United States Government and foreign governments for use tax purposes, see Rule No. 1 of the use tax Rules and Regulations.

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